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SUPREME COURT, U.S.

No. 07-630

# IN THE
# Supreme Court of the United States

MARY SCOTT,

Petitioner,

v.

METROPOLITAN HEALTH CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
and MICHAEL FAAS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner may properly seek and obtain review of an alleged violation of her rights of due process by the District Court when she failed to request the hearing to which she now claims she was entitled and failed to assert any violation of her due process rights in the District Court or in the Court of Appeals until she sought reconsideration of the Court of Appeals' decision affirming the award of sanctions against her.

2. Whether the District Court violated Petitioner's right to due process or abused its discretion by finding Petitioner pursued her claim in bad faith and sanctioning her pursuant to its inherent authority without an evidentiary hearing where Petitioner withdrew her request for an evidentiary hearing and where the factual predicates of Petitioner's case were facts that Petitioner unquestionably knew to be false at the time she filed her complaint.

## DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Sup. Ct. R. 29.6, Respondent Metropolitan Health Corporation states that it is not a subsidiary or affiliate of another corporation and that there is no publicly-owned corporation that holds 10% or more of the corporation's stock.

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## STATEMENT OF THE CASE

### I. Overview

In April 2002 Petitioner Mary Scott ("Scott") was one of four senior Vice Presidents at Respondent Metropolitan Health Corporation ("Metropolitan"). When she was informed that she was being demoted and transferred to a dead-end position, she made an internal report alleging fraudulent practices at Metropolitan - including unlawful physician pay practices. Metropolitan's Board promptly retained two highly respected law firms to investigate Scott's allegations and halted her demotion and transfer.

Early in their investigation, the investigating lawyers were told by one of Scott's subordinates that Scott had taken the only tape recording of an important corporate board meeting held February 7, 2002 at which Metropolitan's physician compensation plan had been approved. The investigators were also told that Scott had thereafter altered the minutes prepared by the meeting secretary so that it appeared she had objected to the physician compensation plan and had asked for the plan to be reviewed by outside legal counsel. After Scott submitted her altered version of the minutes to the investigators without disclosing her changes, they recommended that the Board suspend Scott pending further investigation.

During the investigation other participants in the February 7 meeting told investigators that

Scott's version of the minutes was false – that she had actually supported the motion to approve the physician compensation plan and had not objected to the plan or asked for it to be reviewed by outside counsel. When the investigators asked Scott to produce the recordings from the February 7 meeting so the discrepancy could be resolved, she denied possessing them. Based upon the investigation and recommendation of the outside investigators, Scott's employment was terminated.

Scott thereafter filed a retaliation claim under the False Claims Act, 31 U.S.C. §3730(h). During the litigation, Scott was repeatedly asked to produce the recordings of the February 7 Board meeting. She did not do so. She testified – both by deposition and by affidavit – that she had turned over all of the recordings she possessed, and that her altered version of the minutes of the meeting was accurate. As briefing on motions for summary judgment concluded, Scott produced what she claimed was a complete transcript of the February 7 Board meeting. The transcript and the subsequently produced recording substantiated the investigators' prior conclusions: The version of the minutes that Scott had submitted to investigators was false, and Scott had then hidden the tape recorded evidence to avoid discovery of her submission of false evidence in support of her claims of fraud.

With this new evidence, Respondents renewed their motion for summary judgment, which was granted after further extensive briefing.

Respondents then sought sanctions against Scott for failing to produce the recording of the February 7 meeting as required under Fed. R. Civ. P. 26, for filing false affidavits in violation of Fed R. Civ. P. 56, and for bringing and maintaining a frivolous retaliation claim in bad faith. *Scott did not request oral argument or a hearing on the sanctions motion.* The District Court granted the motion based upon the voluminous written submissions of the parties. Scott thereafter sought reconsideration of the District Court's decision and requested an evidentiary hearing; however *she voluntarily withdrew that motion and her request for a hearing before the Court could rule.*

Scott appealed the District Court's decision to the Court of Appeals for the Sixth Circuit. *In her appeal she did not assert that she had been wrongfully deprived of a hearing on the sanctions motion or denied due process and failed to assert such a position during oral argument when challenged to do so.* A unanimous panel for the Sixth Circuit affirmed the District Court. Scott then sought reconsideration *en banc* asserting *for the first time* that she had been wrongly denied a hearing on the sanctions motion and thereby deprived of her due process rights. Scott's motion for *en banc* reconsideration was denied and this Petition followed.

## II. Factual History

Scott began employment at Metropolitan in December 1997, at the age of 37 as Senior Vice President of Network Development – one of four senior vice president positions within Metropolitan. App. 136a. She was selected for that position by Metropolitan's chief executive officer, Respondent Michael Faas ("Faas").

Barely a year after being hired, Scott began consulting with legal counsel, claiming she was being unfairly treated by Faas.[1] App. 1b-6b. Scott repeatedly but unsuccessfully sought to convince her attorney that she was a victim of age and sex discrimination. *Id.* She began secretly tape recording her conversations with co-workers, attorneys and superiors. App. 141a.[2] Scott's relationship with her management peers during this time was often acrimonious and disruptive. In the latter half of 2000, Metropolitan's head of human resources, Sandy Sefton, suggested that Scott's conduct should be addressed and that she should be told to seek counseling. App. 16b. The problems, however,

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[1] In the course of this litigation, Scott waived her attorney-client privilege with regard to her communications with her first lawyer, Linn Hynds, as well as with her trial attorneys, Frank, Haron, Wiener and Navarro. Thus, at the time of the sanctions motion her dealings and communications with legal counsel were not shrouded by the attorney-client privilege.

[2] Scott produced versions of some of these recordings during discovery, but was unable or unwilling to produce others. Many were withheld by Scott from her own lawyers until long after discovery closed. App. 109a-111a. The District Court concluded these secret recordings were inadmissible because they were inherently unreliable. App. 141a-142a, Note 5.

continued and in early June, 2001, Faas and Sefton initiated an assessment by an outside consulting firm of all current senior management, including Scott. App. 143a.

In the fall of 2001 several of Scott's subordinates contacted Sefton to express concern that Scott would retaliate against them if they participated honestly in the proposed assessment process. *Id.* A few months later Scott's staff reported multiple flagrant acts of misconduct by Scott. App. 145a-146a. Two of Scott's staff presented journals that contemporaneously cataloged Scott's bizarre and troubling conduct. App. 16b. As the District Court observed, if these reports were fiction, they were well-crafted; and if they were true, they provided ample reason for Scott's removal. App. 146a, Note 9.

Faas concluded that he had no choice but to take action with respect to both Scott and another troublesome executive, and he planned to do so by eliminating both of their positions as he reorganized the entire executive leadership team. App. 149a-150a. In mid-April, Scott was told she was being removed as Vice President of Network Development and "reassigned" to a dead-end position from which she was expected to resign or be fired. App. 150a.

Scott contacted her lawyer (Hynds) and then called Jeff Fraser, an employment lawyer with Metropolitan's general outside law firm. She made allegations of fraud and misconduct against Faas

and other management team members. App. 151a. Among others things, she claimed there were improprieties in the physician compensation system. She also presented claims that Faas had mistreated her in the course of her employment – the same age and sex discrimination claims she had unsuccessfully pressed on her own lawyer for several years, but now cast as "retaliation" for her purported opposition to Faas' allegedly fraudulent conduct.

After learning of Scott's allegations and of Faas' previously announced plan to remove Scott from the organization, the Executive Committee of Metropolitan's Board of Directors (the "Board") immediately halted her reassignment/termination until her allegations could be investigated. App. 152a. Scott was removed from Faas' supervision and directed to report to the Board. The Board then engaged the law firm of Epstein Becker & Green to independently investigate Scott's fraud allegations and to report to the Board. App. 152a-154a. They also engaged Attorney Fraser to investigate her allegations of mistreatment. App. 154a.

Scott's current characterization of Fraser's investigation as biased or superficial is unsupported by the record.[3] It was Scott who chose Fraser as her initial confidant in making her allegations against Faas and others. She further confided to her lawyer – and later to her own staff – that she was confident that Fraser would support her over Faas. App. 46b-

[3] Scott's assertion in this regard is also a red herring since her acts of misconduct are now undisputed. App. 18a.

47b. Predictably, neither Scott nor her counsel objected to Fraser's appointment. Much of Fraser's investigation was actually directed by Scott who insisted that Fraser interview her staff. App. 18a. When he did so, however, the staff reiterated and expanded upon the complaints previously reported to Sefton and Faas about Scott's misconduct. App. 41b-46b. Worse, they told Fraser that Scott was actively attempting to manipulate the investigation of her allegations by telling them what to say, by feeding them false information about the investigation and - as discussed below - by submitting falsified records to the investigators as evidence. App.46b-51b.

A month into the investigation, Scott's administrative assistant told Fraser that she had been the meeting secretary at a corporate Board meeting on February 7, 2002, which Scott attended. She reported that during the investigation Scott had taken the original (and only) tapes of the meeting – a direct violation of an investigatory protocol Scott had signed – and had thereafter altered the minutes that the assistant had prepared. App. 47b, ¶16 and 49b, ¶19. The assistant's report, coupled with other reports and observations of Scott's conduct during the investigation, caused both Fraser and Epstein Becker to recommend to the Board that Scott be removed at least until the investigations could be completed. The Board placed Scott on a paid leave of absence on June 12, 2002. App. 163a.

The fact and scope of Scott's alteration of the minutes is no longer subject to debate.[4] Scott made three material changes to the minutes prepared by the meeting secretary.

*First*, Scott *added* a paragraph to the minutes reflecting that she had told the Board at the meeting that the physician bonus plan had been improperly adopted and should be reviewed by outside counsel. In fact, she had not. *Id.*

*Second*, Scott *deleted* mention of a report to the Board regarding outside counsel's review of the physician compensation plan. In fact, that discussion had occurred in her presence without her objection. *Id.*

*Third*, Scott *removed* the record of her support of the motion approving the physician compensation plan. In fact, her second was announced at the meeting without objection. *Id.*

It is also undisputed that Scott submitted her revised version of the minutes to the outside attorneys investigating her allegations that the physician compensation plan was unlawful, and that she did so without disclosing her changes and without disclosing that the version she submitted

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[4] It is summarized by the District Court at App. 156a-163a and 181a-182a, and by the Court of Appeals at 18a-19a.

did not accurately reflect what had occurred at the meeting of the Board or her role in it.[5]

After learning of Scott's submission of the altered minutes, Fraser repeatedly asked Scott to provide the actual recordings that she had taken from her assistant. Though Scott had the tapes, she denied possessing them or knowing where they were. When she later made a written submission to Fraser that purported to quote a discussion from the Board meeting, Fraser again asked for the tapes. She eventually turned over to Fraser a *copy* of one of three cassettes on which the Board meeting had been recorded, claiming (erroneously) that it proved she had not seconded the motion approving the physician compensation plan. She continued to deny that she had the rest of the tapes that captured the events reflected in her other addition and deletion to the minutes. App. 163a-164a.

Fraser's interviews with Scott's staff convinced him that she had engaged in the very misconduct that had prompted Faas – prior to any report of purported fraud – to act to eliminate her position and to terminate her from the organization. More importantly, he concluded that she was also deliberately interfering with the investigation of her

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[5] Scott contends that the minutes were merely "draft", and that her changes therefore were benign (Pet. p. 24); but there is nothing in the record indicating that Scott advised anyone to whom she submitted her version of the minutes that these were "draft" or that they did not reflect the events that actually occurred at the Board meeting.

allegations by (among other things) submitting falsified documents and by hiding evidence that might reveal her misconduct. He recommended to the Board that Scott be terminated from employment. The Board concurred and directed Faas to proceed with his previously interrupted plan to eliminate the positions of both Scott and another Vice President. Both were separated from the organization in January 2003. App. 164a.[6]

## III. Proceedings and Disposition Below

In July 2002 – shortly after her suspension – Scott filed a sealed *qui tam* action against Respondents and nineteen (19) other corporate and individual defendants under the False Claims Act, 31 U.S.C. §3730(b)(2) and (4) (the "FCA").[7] Scott

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[6] Scott claims she was not discharged for cause (Pet. p.3) and that Metropolitan's public announcement that her employment was terminated in a management restructuring evidenced an effort to mask its retaliatory motive (Pet. p. 29). Scott's position was, in fact, eliminated as part of a reorganization (App. 164a), and there is no evidence in the record to the contrary. While Metropolitan refrained from *publicly* disclosing Scott's misconduct, Scott's own Complaint reflects that she was aware of the actual basis for her suspension and termination. App. 71b-77b. There is simply no question in the record that Scott knew what Metropolitan suspected she had done and that these (entirely accurate) suspicions were the basis for her removal from the organization.

[7] Scott's filing followed Metropolitan's self-report to the Office of Inspector General regarding its internal investigation into some allegations that Scott had brought to the Board

filed an Amended Complaint (also under seal) in April, 2003 – about three months after being terminated – to add a claim of retaliation against Respondents under the FCA. Scott's husband, Attorney Mark Scott, substituted and appeared as her counsel of record in September 2003 and remained in that capacity throughout the proceedings in the District Court. The firm of Frank, Haron, Weiner & Navarro – who Scott now says is responsible for the conduct which prompted the sanctions – joined the case shortly thereafter.

In November, 2003, the file was unsealed, and the Government – with whom Metropolitan had been negotiating in the context of Metropolitan's prior self-report – formally intervened in the case and promptly settled. All of Scott's *qui tam* claims against all of the defendants were dismissed *with prejudice* in January, 2004 and without any admission or finding of liability or misconduct. App. 88b-90b.

Scott, however, not only refused to dismiss her retaliation claim against Respondents, she expanded upon it.[8] Following extensive discovery, cross-motions for summary judgment on the retaliation claim were filed in February, 2005. Scott submitted four (4) briefs (totaling 142 pages) and 17 affidavits (almost all her own, totaling 149 pages). In her

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There is no evidence that Metropolitan or Faas knew of Scott's *qui tam* action until *after* Scott was discharged.

[8] Excerpts from Scott's Revised Second Amended Complaint appear at Appendix 5, App. 60b-76b.

affidavits, Scott affirmatively represented that her version of the minutes of the February 7 meeting was "accurate". App. 99a-101a. The District Court denied Scott's motion, and dismissed Respondents' motion without prejudice. App. 102a.

On May, 16, 2005 Respondents re-filed their summary judgment motion, this time with the benefit of the disclosure (made by Scott's counsel at the conclusion of the initial briefing) of the existence and content of all three cassettes on which the February 7 Board meeting was recorded – a recording which Scott had denied possessing and had failed to produce despite numerous discovery requests. In opposing the renewed motions, Scott submitted another 107 pages of personal affidavits and another 119 pages of briefs.

On June 23, 2005, the District Court issued its Opinion and Order dismissing Scott's claims. App. 133a-190a. The District Court found that Scott had failed to establish even a *prima facie* case of retaliation. App.180a It went on to hold that even if a *prima facie* case had been established, the myriad examples of Scott's misconduct – many of which (such as her falsification of the minutes and concealment of the recorded evidence) were now beyond dispute – provided ample justification for her termination. App. 181a-182a. Finally, the District Court concluded that even if some of the reports of misconduct made by Scott's co-workers were not "undisputed" for Rule 56 purposes, Metropolitan's

"honest belief" in the truth of those reports effectively was. App. 182a-183a.

Shortly thereafter Respondents filed a motion seeking sanctions against Scott[9] on three grounds:

(1) Scott, in violation of Fed. R. Civ. P. 26, had failed to turn over to Respondents in a timely manner the complete recording of the February 7 Board meeting despite repeated discovery requests to do so.

(2) Scott, in violation of Fed. R. Civ. P. 56, had submitted false affidavits during the briefing on summary judgment – specifically, affidavits claiming that the altered version of the Board minutes that she prepared and submitted to investigators was accurate.

(3) Scott had maintained her retaliation action in bad faith because she irrefutably knew at the outset of the litigation – but had continued to deny – that she had engaged in the exact misconduct for which she was suspended and later terminated and which was sufficient under any standard to sustain her termination. Sanctions for this misconduct were sought under the court's inherent authority.

In opposing the Motion, Scott was permitted to substantially exceed the applicable briefing

[9] Sanctions were not sought against Scott's legal counsel.

limitations.[10] Scott's assertion that the District Court "declined to hear oral argument" with respect to the sanctions motion (Pet. p.3) is at best misleading. The fact is *neither* party requested oral argument or other hearing on the motion for sanctions.[11] Further, in all of her voluminous submissions to the District Court concerning the motion for sanctions, Scott *never* asked for an evidentiary hearing, and *never* argued that an evidentiary hearing was required as a matter of due process. *Indeed, Scott submitted only one piece of affidavit testimony in opposition to the motion – and that was not her own.* Finally, at no point did Scott or her attorney-husband, who remained her counsel of record, assert that the sanctions motion created a conflict of interest between Scott and her *other* counsel.

On September 29, 2005, the District Court concluded that Scott had failed to disclose or turn over the complete tape recording of the February 7 Board meeting until the end of the first briefing on summary judgment, in violation of her obligations under Fed. R. Civ. P. 26. The Court also concluded that her failure to produce the complete recording in a timely manner delayed dismissal of the action

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[10] *See*, W.D. Mich. LCivR 7.3(b) *at* App. 85b, and the Court's Order waiving this limitation at App. 86b. Scott's initial brief on the motion was 25 pages long, and she made additional filings later.

[11] If Scott wanted oral argument, she could request it in writing on the face of her brief. W.D. Mich. LCivR 7.2(d) and 7.3(d). App. 84b-85b. Scott did not include any such request on any of her filings regarding Respondents' motion for sanctions.

because it deprived Respondents of conclusive proof that Scott had prepared and submitted falsified evidence to investigators as Metropolitan had alleged and Scott had denied. Pursuant to Fed. R. Civ. P. 26 and Fed. R. Civ. P. 37, the Court awarded sanctions against Scott in the amount of the attorney fees incurred by Respondents as a result of having to re-file and re-brief their motion for summary judgment – essentially fees from May 2, 2005 (when the first motion for summary judgment was denied) until June 23, 2003 (when the case was dismissed). App. 125a, Note 12.

The District Court also concluded that Scott had submitted false and misleading affidavits in connection with the summary judgment motions in violation of Fed. R. Civ. P. 56 – specifically those asserting the accuracy of her altered version of the corporate Board minutes. The Court concluded that Scott's false affidavits had confused issues during the first summary judgment briefing, and therefore awarded sanctions against Scott in the amount of the attorney fees incurred by Respondents after their first motion for summary judgment was denied.[12]

Finally, the District Court concluded that Scott had brought and maintained her retaliation claim in bad faith because she knew from the outset

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[12] App. 126a. The Court made clear that although the measure of this sanction was the same as the sanction awarded under Rules 26 and 37, it was not intended as a double award. Rather, the Court was awarding one sanction amount on two separate grounds. App. 128a, Note 14.

that (1) she had withheld from Metropolitan the tape recordings of the February 7 Board meeting, (2) she had altered the minutes of that Board meeting in a manner that falsified their content, (3) she had submitted the minutes to investigators who were investigating her allegations of fraud without disclosing that the minutes were falsified and inaccurate, and (4) she was aware that these acts of misconduct were the reason she was suspended and later terminated.[13] The Court concluded that Scott could not have believed that she had been terminated in retaliation for protected activity. Based upon these findings, the Court entered sanctions against Scott in the amount of slightly over $1.6 million, representing most of the attorney fees incurred by Respondents defending the retaliation claim after the dismissal of the *qui tam* action.[14]

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[13] Scott now claims that she honestly believed that this flagrant misconduct was not the *real* reason for her termination - a curious and belated reconstruction of her position throughout the litigation. Until now, Scott has continuously *denied* her misconduct – a position which was and remains factually untenable under any rational view. Only now that Scott seeks cover under the due process clause does she alter her position from one of outraged denial to one of innocent (if irrational) disbelief that her misconduct prompted her termination.

[14] Scott and *amicus* both assert that the sanction award against Scott was for *all* of Metropolitan's legal fees. To the contrary, the District Court did not award "the totality of respondents' legal fees for the entirety of this action. . . . ." (Amicus Brief, p. 14) The fees awarded related *only* to work performed after the dismissal of the *qui tam* action. No fees associated with defending Scott's *qui tam* action were awarded.

After the District Court's ruling, Scott filed a Motion for Reconsideration of the sanction award, together with a 25 page supporting brief. She there asserted that certain evidence presented to the District Court by Respondents as part of their motion for sanctions was "fake" – specifically, a fragmentary recording of the February 7 Board meeting that Respondents represented was the recording produced by Scott during discovery. App. 99b-101b. She also again insisted that the affidavits she had filed were not false. App. 98b. In her Motion – unlike in her prior filings – Scott *did* ask the Court to hold an evidentiary hearing. Her request, however, expressly indicated the purpose of the hearing was to allow her to prove that Metropolitan had submitted false evidence concerning her failure to timely produce the February 7 tape recording.[15] *But Scott voluntarily withdrew her Motion – including her request for an evidentiary hearing – before the Court ruled.* App. 7b-13b.

Scott then sought appellate review of the sanctions award. Scott presented no claim or argument in her briefs or at oral argument that her due process rights had been violated or that she was

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App. 64a and 127a, Note 13. Further, the Court's award ultimately covered only about 80% of the fees actually incurred during the retaliation case. App. 64a-65a.

[15] Thus, unlike the hearing Scott now claims she was owed, the hearing she requested was not for purposes of parsing blame for her litigation misconduct.

constitutionally entitled to a hearing before an award of sanctions could be entered. Her first and *only* assertion of a due process argument was made as part of a motion for reconsideration or rehearing *en banc* after a three judge panel had unanimously affirmed the District Court's decision.[16]

## IV. Other Misstatements of Fact

A few other misstatements of fact in the Petition or in the brief of the proposed *amicus* should be noted.

1. Scott's assertion that she reported billing fraud and similar issues to Faas in the summer of 2001 (Pet., p.2) is not true and is not supported by the record. Scott claimed that certain documents showed she had told Faas about the alleged fraudulent activities, and she asserted this was why he ostensibly "retaliated" against her. But as the District Court observed, "the documentation itself does not appear especially indicative of a report of fraudulent activity." App. 165a. Her belated affidavit testimony of undocumented discussions with Faas about fraud contradicted her own

[16] Scott misleads when she claims to have asserted in the Court of Appeals that the District Court committed reversible error when it sanctioned her under Rules 26(g)(3) and 37 "without an evidentiary hearing." It is true that her appellate brief described the lower court's ruling under those Rules as one that had been made "without an evidentiary hearing;" however, she offered no intimation of a constitutional due process claim.

deposition testimony. App. 167a-169a and 172a-173a.[17]

2. Scott and *amicus* both assert that fraudulent conduct by Metropolitan and/or Faas was established. Their claims are simply untrue. There has never been any admission, evidence or finding of any fraudulent conduct by Metropolitan or any of its employees – including Faas. Scott's *qui tam* action was dismissed *with prejudice*. The settlement between the government and the multiple defendants named in the original complaint did not include any admission of misconduct or liability, and was entered for reasons unrelated to any actual or perceived validity of those claims.[18] Scott's attempt at this point to treat a settlement of disputed claims as evidence of the misconduct alleged is impermissible. Fed. R. Evid. 408.[19]

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[17] Scott also argues that she vigorously disputed in the District Court the extent of her compliance duties, evidencing a good faith factual dispute that she might have prevailed upon and that might have affected the viability of her *prima facie* case. Pet., p. 32. What she neglects to note is that the Court's description of her compliance duties came entirely from documents that *she authored* (App. 136a, 138a-139a) which is why the Court properly found no factual dispute on that issue. Scott's purported "good faith" dispute thus presupposed that she could legitimately and successfully disavow her own characterization of her duties.

[18] It also was entered long before the fact of Scott's submission of falsified evidence in support of her claims was conclusively established.

[19] Scott relies upon this purported evidence of Faas' fraudulent conduct as the predicate for her assertion of disparate treatment and her "good faith basis" for believing

3. Scott's assertion that she was advised by her attorney to withhold a recording of the February 7 meeting (Pet. p.4), though technically accurate, is misleading. The lawyer who provided this errant counsel was Linn Hynds, *not* the trial counsel who Scott now blames for her woes. Further, Scott at the time actually was also deceiving Mr. Hynds about her possession of the tapes, telling him she had only "found" one of them. She did not disclose to him that she had the *full* recording. Finally, the recording which Hynds advised to her to withhold was released a few days later after Scott foolishly quoted from it verbatim in a written defense of the purported accuracy of her altered version of the minutes. Though Mr. Hynds' misguided zeal in encouraging his client's continuing deceit did little to improve her prospects of continuing employment, it had no impact upon any sanction entered against Scott.

4. Scott asserts that the Court of Appeals "refused to consider" whether Scott's alteration of the minutes was "inappropriate" or whether Metropolitan's investigation was sufficient to reach that conclusion. (Pet. p.5) Scott mischaracterizes the record. The Court of Appeals found that Scott's argument regarding the sufficiency of Metropolitan's investigation *"is untenable to the point of absurdity"* because Scott admitted having engaged in the offending conduct. App. 18a. It also found that she

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herself a victim of retaliation (Pet. p.3, 29-30); but since the predicate fact for this argument does not exist, the argument is specious.

*"did not proceed in an honest, ethical fashion with regard to the minutes."* App. 19a. Finally, the Court of Appeals expressly affirmed the finding that Scott had submitted false affidavits – an issue which specifically concerned whether her altered version of the minutes was "accurate" as she had asserted and therefore necessarily involved a conclusion by the Court of Appeals that her version was *not* accurate. Far from "refusing to consider" the appropriateness of Scott's alteration of the minutes, the Court of Appeals *emphatically* found her changes and conduct to be "inappropriate."

## ARGUMENT

### I. Petitioner's Due Process Argument Has Not Been Preserved.

#### A. Scott Never Requested a Hearing and Never Asserted a Violation of Due Process.

Scott asserts that the sanction award entered against her should be reviewed because it was entered without an opportunity for an evidentiary hearing. She claims the District Court thereby violated her due process rights.

Scott presents an argument she failed to raise below. Scott did not ask the District Court for oral argument or a hearing in connection with Metropolitan's sanctions motion. Though Scott eventually asked for an evidentiary hearing as part

of her motion for reconsideration in the District Court, she affirmatively withdrew that request before the Court could act. Thus, in the District Court Scott did not request the relief she now seeks (a hearing), did not assert that the Court's findings of fact could not be made without an evidentiary hearing, and did not assert that the absence of such a hearing violated her due process rights.

Scott similarly failed to present to the Court of Appeals the arguments she now asserts. While Scott noted that the decision of the District Court had been made without an evidentiary hearing, she did not assert that the lack of a hearing was itself error *per se,* much less that due process mandated such a hearing as a minimum precondition to the award of sanctions against her. Similarly, no due process claim was asserted at oral argument. Not surprisingly then, no discussion of such a claim appears anywhere in the detailed opinion of the Court of Appeals.

Scott's due process argument was presented for the first and only time when she sought reconsideration *en banc* in the Court of Appeals. It is a well-established rule of appellate practice that a party may not raise for the first time on reconsideration an argument not presented in the original appeal. *Bath Iron Works Corp. v. Director, Office of Workers' Compensation,* 506 U.S. 153, 162 (1993) ("Petitioners did not raise the issue below and the Court of Appeals considered it waived. We do as well.") (internal citations omitted); *Bickel v. Korean Air Lines Co.,* 96 F.3d 151, 153 (6th Cir. 1996) (party

waived issue by failing to raise it in its opening briefs to the court of appeals), *cert. denied,* 519 U.S. 1093 (1997); *Brindley v. McCullen*, 61 F.3d 507, 509 (6th Cir. 1995) (issue waived if not fully developed in brief); *Consolidated Edison Company of New York, Inc. v. Federal Energy Regulatory Commission,* --- F.3d---, 2007 WL 4386117 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (internal citations omitted); Fed. R. App. P. 28 (a)(9) (appeal brief must include an argument containing the party's "contentions *and the reasons for them*").

Likewise, matters not raised or otherwise preserved for review in the lower court are not appropriately presented on appeal. *Singleton v. Wulff,* 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). *See also, Pacific States Box & Basket Co. v. White,* 296 U.S. 159, 164 (1935) (declining to consider issue not made in the lower courts or discussed by the lower courts); *Regents of the University of California v. Bakke,* 438 U.S. 265, 283-284 (1978) (declining to review an issue raised by petitioner that was not addressed in lower courts); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434 (1940) (it is the settled practice of the United States Supreme Court that it is only in exceptional cases that is considers questions urged by a petitioner not pressed or passed upon in the courts

below).[20] In short, Scott's Petition to this Court is predicated on relief she never sought and a legal argument she never presented below.[21]

### B. Scott's Failure to Present Her Due Process Claim Below Is Not Excused.

Scott makes three arguments as to why the rule barring the introduction of a new issue on appeal should not apply to her Petition to this Court. *First*, she claims that Respondents have waived any objection to her failure to present the argument earlier. *Second*, she claims the lower courts' failure to order an evidentiary hearing constituted "plain error" even in the absence of the issue being raised by Scott. *Third*, she claims that her failure to raise

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[20] *See also, Union Planters Nat'l Bank of Memphis v. Commercial Credit Bus. Loans,* 651 F.2d 1174, 1187 (6th Cir. 1981) ("It is axiomatic that an issue not presented to the trial court cannot be raised for the first time on appeal."). Scott notes that a due process argument was presented in an *amicus* brief filed by the National Employment Lawyers Association. However, *amicus* cannot expand the scope of an appeal to consider issues not presented by the parties, particularly to assert a procedural right that was not merely ignored but affirmatively waived by the appellant or a constitutional issue that neither party has asserted. *Eldred v. Reno,* 239 F.3d 372, 378 (D.C. Cir. 2001).

[21] That is why the Court of Appeals' opinion makes no mention of a due process claim; none was presented. It noted Scott's unhappiness with the lack of oral argument, but only relative to her rejected claim that the District Judge should be recused as biased – a ruling not challenged by her Petition to this Court.

the issue is attributable to her attorneys who had an inherent conflict of interest because they were responsible (and therefore subject to sanction) for the failure to produce the complete recording of the February 7 Board meeting. None of these arguments is sound.

### 1. Respondents Did Not Waive Objection to Scott's New Argument.

Scott asserts that Respondents waived objection to the presentation of her due process argument, citing *U.S. v. Quiroz,* 22 F.3d 489 (2d Cir. 1994); but *Quiroz* is inapposite. At trial, Quiroz failed to timely object to a suppression ruling. After being convicted, he appealed the suppression ruling. Instead of arguing that Quiroz waived objection to the suppression ruling, the government defended the merits of the ruling. Based on the merits, the Court of Appeals reversed. Only upon a motion for reconsideration did the government assert that Quiroz had waived the suppression issue. The Court found that although Quiroz did not timely object to the suppression ruling at trial, the government had waived its objection to Quiroz's suppression argument by addressing the merits on appeal without asserting waiver.

Here Scott never presented her due process argument in a forum where Respondents could

object.[22] Respondents cannot be said to have waived objection to presentation of an argument that – unlike the argument in *Quiroz* – was never previously asserted.

### 2. The "Plain Error" Exception is Inapplicable.

Scott next asserts that this Court should consider her due process claim as a "plain error evident from the record" under S. Ct. R. 24.1(a). The Court obviously may consider such questions as it deems appropriate to and consistent with the orderly administration of justice, subject only to the constitutional limitations imposed upon it. But the rules concerning plain error, though not immutable, ought not be carelessly construed or abandoned or the very purpose of orderliness will be frustrated.

The Rule relied upon by Scott does not speak to consideration of issues that were not presented in any lower court, but to issues that have not been presented by Petition to *this* Court. The Rule – which cross-references S. Ct. R. 14 governing the content of a petition for a writ of *certiorari* – requires the articulation of the questions presented for review by the Court, but permits the Court "[a]t its option... [to] consider a plain error not among the questions presented. . . ." The Rule thus appears to address consideration of issues a party neglects to present for

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[22] Scott's prior assertion of this argument in her motion for reconsideration in the Court of Appeals did not afford Respondents the chance to object. Fed. R. App. P. 35(e).

review by this Court, not the resurrection of issues waived in the courts below or (as here) the incarnation of issues never previously presented.

The plain error rule in any event ought not to apply to Scott's case. This Court has recognized that the "plain error" rule is appropriately invoked only if four factors are met: (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the Court determines, after examining the particulars of the case, that the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano,* 507 U.S. 725, 730 (1993).[23]

*Did any error actually occur?* "Deviation from a legal rule is 'error' unless the rule has been waived." *Olano,* at 732-33. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Id.* at 733 (internal quotations and citations omitted). Scott here both waived and forfeited whatever hearing right she may have had. She did not request a hearing initially – a forfeiture of that right. She thereafter requested a hearing as part of her motion for reconsideration in the District Court; but she then withdrew that request – a

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[23] This is the standard adopted in criminal appellate practice. Whether the standard for "plain error" relief is still higher in civil practice may be uncertain. *See, e.g., In re Celotex Corp.*, 124 F.3d 619, 631 (4th Cir. 1997).

waiver. There is no error, plain or otherwise, to correct

*Was the purported error "plain?"* "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'" *Id.* at 734. Scott acknowledges that "due process is flexible," its demands varying with each particular situation. (Pet. p.9). She predicates her Petition upon her perception of a divergence among the circuits in their understanding and application of the due process requirements in a sanction proceeding (*Id.*) and the absence of resolution of these issues by this Court. (Pet. p.5) If true, as Scott maintains, how can it be said that the failure to hold such a hearing under these facts was "plain", "clear" or "obvious" error?

*Did the purported error – the failure to sua sponte order an evidentiary hearing – affect "substantial rights" of Scott?* The right to a hearing is, in the abstract, a substantial right. But where a hearing would serve no useful purpose because of the settled nature of the issues dispositive of the question before the court, the absence of a hearing cannot be said to affect a "substantial right." As discussed, *infra,* due process does not require the performance of useless acts.[24]

*Did the purported error seriously affect the fairness or integrity of judicial proceedings?* A case cited by Scott, *In re Celotex Corp.*, 124 F.3d 619, 630-31 (4th Cir. 1997), found the fourth element of the

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[24] *See,* Part II, *infra.*

*Olano* requirements lacking because the appellant could have raised the issue earlier and could still recover its losses through a collateral proceeding. Though Scott asserts that her ability to preserve her due process rights to a hearing was compromised by a conflict between her interests and those of her counsel, she ignores that her own husband was also counsel of record. Scott fails to articulate how her interest in avoiding personal sanction diverged from that of her husband. Both would seem equally interested in any proceeding that might mitigate or avoid any financial sanction affecting their joint household; and therefore both would seem equally interested in demanding a proceeding that could shift financial liability from Scott to her other attorneys. Mark Scott's role as counsel of record and the coterminous financial interests of Scott and her attorney-husband afforded her ample opportunity and reason to request a hearing had either of them believed it to be in their interests to do so – *and yet they did not make such a request.* In any case, to the extent that Scott believes her other attorneys are responsible for the sanctioned conduct (or the absence of a hearing on the sanctions), she (like the appellant in *Celotex)* may be made whole in a collateral (malpractice) proceeding. The fundamental fairness and integrity of the judicial proceeding has not been compromised.

None of the requirements for the invocation of the plain error rule under this Court's precedents are met in this case.

### 3. The Conflict of Interest Is Illusory.

Finally, Scott argues her failure to previously assert a violation of due process is excused due to a conflict of interest between Scott and her counsel. While such conflicts may exist in some sanction proceedings, for the reasons just noted this argument is less than compelling here where Scott was at all pertinent times represented by her husband as well as the allegedly offending Frank Haron lawyers. Scott and her attorney-husband had terminated two prior law firms during the *qui tam* proceeding and made various filings adverse to those firms in connection with fee and similar disputes. It strains credulity to suggest they were suddenly paralyzed from acting when a conflict arose that Scott posits was so plain that the District Court should have intervened *sua sponte*.

Nor is it apparent that Scott's other attorneys failed to fully and earnestly defend their client in the sanction proceeding. Scott's lawyers were not a target of the motion for sanctions. Perhaps for that reason they submitted affidavit testimony from their own employee indicating that they believed they received the complete tape recording of the February 7 Board meeting in July 2004 – a few months after the recording should have been produced but several months before it actually was produced – and that they thought they had produced it to Respondents at that time. The lawyers fell on their sword; they did not abandon or blame their client. Scott thus fails to

substantiate a conflict that deprived her of a hearing or due process.[25]

## II. Due Process Did Not Require A Hearing In This Case.

As relates to an award of sanctions against a party, due process requires notice and a meaningful opportunity to be heard. Scott did not lack either.

Though Scott presumes to discern – or seeks to establish – a universal rule of due process which always requires an evidentiary hearing before a court may make an award of attorney fees pursuant to its inherent authority, the standards of due process are not so rigid. In *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976), the Supreme Court held that "'[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' * * * '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (internal citations omitted).[26] *See, Link v. Wabash R. Co.,* 370

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[25] The District Court's rejection of the paralegal's testimony regarding her tape copying activities was based upon: Scott's own emails that showed she had withheld recordings from her lawyers; her own expert's report indicating that several of the recordings Scott had produced were copies, not originals; and gaps and inconsistencies found in the paralegal's testimony. App. 107a-112a.

[26] Scott's assertion that there is a "conflict" within the circuits regarding the necessity of an evidentiary hearing before a party may be sanctioned is illusory; the variations arise from the unique facts and circumstances of the particular

U.S. 626, 632 (1962) (court had inherent power to dismiss a case – a *harsher* sanction than an award of fees – without affording *any* hearing. Not every order "entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing . . . turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.").

A hearing is not required where it would serve no purpose. *Snyder v. Com. Of Mass.*, 291 U.S. 97, 106-107 (1934), overruled, in part, on other grounds by *Malloy v. Hogan,* 378 U.S. 1 (1964) ("Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence [in a hearing] when presence would be useless, or the benefit but a shadow."); *A. Hirsh, Inc. v. U.S.*, 948 F.2d 1240 (Fed. Cir. 1991) (A right to a hearing for due process purposes is "limited to cases where a hearing would assist the court in its decision"); *Bank of Lake Tahoe v. Bank of America,* 57 Fed. Appx. 310, 312-313 (9th Cir. 2003) (affirming award of attorney fees for bad faith conduct based on court's inherent authority. "[D]ue process argument does not compel reversal because an oral hearing is not required where the court has given fair notice and ensured that the party subject to sanctions has an opportunity to respond in writing to the allegations against him.").

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case, consistent with the flexible view of due process acknowledged in *Eldridge*.

Oral argument or a hearing is not a precondition to finding bad faith sufficient for the court's exercise of its inherent authority to sanction. *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1306-1307 (11th Cir. 2006)

Scott received clear notice that the Court might order sanctions when she received Respondents' motion. She also received a meaningful opportunity to be heard through her submission of extensive written testimony and argument. She had the opportunity to request oral argument, but did not do so. She also could have asked – and eventually did ask – for an evidentiary hearing. But she then withdrew that request.

Assuming Scott does not mean to assert that due process not only affords the *opportunity* to be heard but actual *compels* a party to speak, she is left to assert that she was deprived of her "meaningful opportunity" to be heard by someone other than the court – apparently her own counsel. But whether cast as a conflict of interest or as ineffectual counsel, "due process does not insulate a petitioner from the consequence of his own dishonest acts." *Chen v. Gonzales*, 437 F.3d 267, 270 (2nd Cir. 2006). Here Scott pursued a claim based upon facts she personally knew to be false[27] and she personally provided false testimony to support it. She cannot shirk *her* responsibility by blaming the lawyers she chose to represent her.

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[27] *See e.g.*, App. 68b-70b ¶¶43-45 and App. 72b-74b, ¶¶49-52.

Moreover, Scott's theory ignores that she was not merely represented by the Frank Haron firm – her *third* law firm advising her on these matters – but also by her husband. Scott not only fails to explain how his interests diverged from hers, but how the District Court should have known of that divergence so as to compel Scott to retain other counsel. Scott apparently would require judicial omniscience as a threshold element of due process. Such a rule goes well beyond any of the cases cited in Scott's Petition.

One also must ask the purpose of this missing hearing. Scott's apparent answer is two-fold: (1) to afford her the opportunity to distinguish her responsibility for the failure to produce the recordings from that of her attorneys (Pet. pp.12-15); and (2) to show that her attorneys were more responsible than she for her pursuit of a frivolous claim (Pet. pp:31-36).

Reassigning blame for Scott's failure to timely produce the complete recording of the February 7 Board meeting would not have changed the result for Scott. The *same* sanction was awarded against Scott under Rule 56 for her submission of false affidavits to the Court. Scott acknowledges that she must "take responsibility for the facts relied upon in her attorneys filings" including affidavits prepared for her review and signature. (Pet. pp.11-12) Thus, Scott appropriately bears the entire sanction for her false affidavit testimony under Rule 56; and any

purported error in sanctioning Scott (rather than her lawyers) under Rules 26(g) and 37 was harmless as redundant of that entered against her under Rule 56.

As for the second purpose assigned by Scott to a hearing, she again ignores that "due process does not insulate a petitioner from the consequence of his own dishonest acts." *Chen, supra* at 270. Here, Scott's misconduct was conclusively established from her own writings, recordings and affidavits. A hearing was pointless because Scott: (1) took the recordings; (2) falsified the minutes; (3) submitted the falsified minutes to investigators; (4) lied to investigators regarding her possession of the tapes; (5) lied to investigators about the accuracy of the minutes she had submitted; (6) knew that her wrongful actions formed the basis for her suspension and termination; *and yet (7) lied to the Court about all of this in her pursuit of her retaliation claim.* Scott does not explain how her limitless opportunity to present her arguments in writing and through her countless affidavits on these issues was deficient, or how a hearing on these matters might have yielded a different result.

The Court's sanction award under its inherent powers was predicated upon Scott's initiation and prosecution of a claim that asserted that she had lost her job because she had made an internal report of fraud. The predicate facts in her Complaint were false; the supporting facts in her affidavits were false. The unrebutted and irrefutable truth remains

this: Scott knew when she brought her case that she was guilty of precisely the misconduct which led to her termination – conduct which no one could assert in good faith did not justify termination, regardless of any purported protected activity.[28]

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[28] Were this not enough, and as both the District Court and Court of Appeals addressed in painful detail, Scott failed to present even a scintilla of evidence that this undeniably legitimate basis for terminating her employment was somehow pretextual. Scott and *amicus* incorrectly assert that the lower courts failed to properly consider a "mixed motive" analysis of her claim. Pet. p.30. While it is never explained how a hearing on the sanctions motion might have cured this, in fact the District Court *did* consider Scott's claim without regard to the burden-shifting analysis and still found it wanting. App. 175a, Note 25. Moreover, Scott presents and argues a "mixed motive" analysis relying upon post-1991 Title VII case law. The 1991 amendment altered the mixed-motive analysis under Title VII, *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003); but the traditional analysis articulated in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), remains applicable to non-Title VII retaliation cases, including cases under the FCA. *Cf. Norbeck v. Basin Elect. Power Coop.,* 215 F.3d 848 (8th Cir. 2000). Scott is left unable to explain how her various and irrefutable acts of misconduct – the proffered reason for her termination – could possibly be rejected as "'unworthy' of belief" under that standard. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993); *Manzer v. Diamond Shamrock Chem. Co.,* 29 F.3d 1078, 1083 (6th Cir. 1994).

Scott also insists that the temporal proximity between her report of fraud to the Board and her termination 8 months later in January 2003 provides by itself a good faith basis for her claim. It does not. She ignores that her only protected activity *followed* a decision by Faas to remove her, and that the subsequent independent decision of the Board to terminate her employment *followed* all of her subsequent undisputed acts of misconduct. In this case the temporal proximity analysis

The only remotely plausible purpose Scott offers for a hearing is to allow her to establish that her lawyers were also responsible for her pursuit of a factually baseless claim. However, Scott has yet to assert that she ever shared with her lawyers the facts that she knew – that she had engaged in the very conduct upon which her termination was based. If she did so at the outset of the litigation, then perhaps those attorneys should also have been sanctioned under the Court's inherent authority;[29] but since Scott has never asserted such a claim before, due process does not now require an opportunity to vindicate it.[30] The requirements of due process may be flexible, but they demand only a "meaningful" opportunity to be heard, not the meaningless one Scott belatedly requests.

Though Scott would have it otherwise, a hearing is not a universal precondition to every sanction award. *Link, supra; A. Hirsh, Inc., supra; In re Sunshine Jr. Stores, Inc., supra; Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 822 (6th Cir. 2000). The action and decisions of the District Court and the Court of Appeals were not contrary to prevailing law and – were entirely appropriate under the unique facts of this case.

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confirms rather than undermines the proffered reason for her ultimate termination.

[29] This, of course, also places her attorney-husband at risk.

[30] In all of the pages of attorney-client communications as to which Scott waived privilege, there was no evidence that she confided her misconduct with her counsel. To the contrary, the records evidenced Scott repeatedly withholding critical evidence from her lawyers.

## CONCLUSION

For the reasons above, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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John M. Lichtenberg
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616-235-3500

# APPENDIX

## APPENDIX 1

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**No. 1:02-cv-485**

**[Filed May 13, 2005]**

| | |
|---|---|
| UNITED STATES OF AMERICA, ex rel. MARY SCOTT, Plaintiff, | ) |
| v. | ) |
| METROPOLITAN HEALTH CORP. d/b/a METROPOLITAN HOSPITAL, a Michigan corporation, and MICHAEL FAAS, Defendants. | ) |

**EXHIBIT K1 TO BRIEF IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT**

July 7, 2000

Mr. Linn Hynds
Honigman, Miller, Schwartz, & Cohn
2290 First Natl. Bldg.
660 Woodward Ave.
Detroit, MI 48226-3583
(313) 465-7426
Lah@honigman.com

Dear Linn:

As discussed yesterday, I first contacted you back in late May 1999 regarding the discrimination I was experiencing within my position as a Senior Vice President with Metropolitan Health System in Grand Rapids. Given economic and career considerations I have continued in this position during the past year. I am now actively seeking alternative employment with a target date for leaving Metropolitan of no later than December 2000. Upon securing alternative employment I plan to terminate my employment with Metropolitan and file a suit based upon gender and age discrimination. I am requesting that you serve as my legal counsel for this.

Enclosed for your review is documentation outlining some of the various issues and situations I have

experienced. The last several pages of my documentation includes transcripts of taped discussions that I had with different individuals. I have the actual cassette tapes in my possession and will rely upon your judgment regarding what to do with these.

I) The first key issue that is prompting my interest in filing a suit involves a Supplemental Executive Retirement Plan (SERP) that I was excluded from.

This plan was first developed and initiated when I was employed with Metropolitan in my current role as the only female out of a total of four Senior Vice Presidents. Extreme secrecy and deceit was involved in trying to keep me from learning about this Plan. I was, however, able to obtain draft Plan documents and memos to Board members and these are included for your review (**See Attachment A**).

In summary, the Plan gave special payments to all of the male Senior VPs and the male President. Specifically, beginning in 1998, two of the older male Senior Vice Presidents who were close to retirement received significant one-time payments of approximately $200,000. At the same time, the other male Senior VP and the President received and continue to receive significant annual payments in a tax-free retirement vehicle (**See Attachment B**).

Although on numerous occasions I was told by the President that I would be included in this Plan, I was and continue to be excluded from it.

A second key issue that is prompting this suit involves additional duties that I was "asked" to assume beginning in February 2000. In summary regarding this issue, Metropolitan Health System owns a Hospital and a number of other entities including a large $40,000,000 Medical Equipment and Pharmacy Company known as White & White. For years White & White reported separately to the Board of Directors and had a separate administrative structure with a full-time President, Chief Financial Officer, Chief Operating Officer, VP of Business Development, VP of Human Resources, and other administrative staff. The financial situation within White & White was increasingly disastrous and the Board fully recognized its inability to manage this entity if management were dismissed. Nevertheless, given the increasing deterioration of this Company, the Board had no other option but to terminate all 7 of the top executives on February 3, 2000. Out of desperation, the Board then asked me, who previously had no involvement with White & White, if I would assume leadership of the Company. Effectively, in February 2000, in addition to all my previous and current full-time duties within Metropolitan, I became the interim CEO, CFO, and COO for this Company and was asked to coordinate and lead a complete company-wide turnaround (**See Attachment D – Minutes of Board Meeting**). Since February I have managed to piece together a management team but I continue to act as interim CEO and CFO with no increase in my salary. The work involved in this

turnaround has been incredible and has resulted in my often working upwards of 80 to 100 hours per week with no vacation or sick time. While I initially requested additional compensation from my boss, the System President, this request was denied even though the prior male President of this Company was, by himself, making significantly more money than I am to this day.

Together, the two key issues produce the minimum compensatory damages I am seeking as follows:

- $150,000 after taxes + 25% annualized interest from 4/98: SERP
- $150,000 after taxes + 25% annualized interest from 1/99: SERP
- $150,000 after taxes + 10% annualized interest from 1/00: SERP
- $250,000 annualized salary from February 3, 2000 for assuming the additional role of interim-CEO/CFO for White & White. This amount reflects the compensation package of the male CEO I was asked to replace.

**APPROXIMATE TOTAL COMPENSATORY DAMAGES: $830,000**

Furthermore, I would also seek payment to cover all attorney fees as well as whatever punitive damages you feel would be appropriate and reasonable. Because compensation of senior executives is a closely guarded secret, I believe that Metropolitan will be motivated to settle this out-of-court.

In addition to the items above that represent blatant discrimination that is easily quantifiable, throughout my employment with Metropolitan I have experienced ongoing discrimination and have been subjected to outrageous and ongoing situations that have negatively impacted my financially, personally and professionally. The enclosed documentation outlines numerous examples of a 'good-old-boys club run amuck' (this is what the Metro outside labor attorney from Varnum, Jeff Fraser, has called the Organization) that has refused to recognize and fairly compensate and treat women, in particular myself.

Finally, given the resulting stress and conflict from my employment situation, during this past year I began treatment for medical complications of an ulcer. The ongoing stress and now resulting medical complications necessitate that I either leave this employment within the next several months or obtain significant organizational changes and back compensation that allow me to remain.

Linn, in my 12 years of working I have never experienced anything even remotely similar to what I have been dealing with over the past 2.5 years. However, I will be most interested to hear your experienced assessment of this situation once you have had an opportunity to review the information.

Again, thank you so very much. I will contact your office on Friday, July 14th to verify receipt of the

information and to discuss next steps. In the interim, I can be reached at work (616) 252-4772 or at home (616) 891-1320 if you would like to contact me.

Thank you very much.

/s/

Mary T. Scott

## APPENDIX 2

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**No. 1:02-cv-485**

**[Filed October 31, 2005]**

| | |
|---|---|
| MARY SCOTT, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| METROPOLITAN HEALTH CORP. | ) |
| d/b/a METROPOLITAN HOSPITAL, | ) |
| a Michigan corporation, and | ) |
| MICHAEL FAAS, an individual, | ) |
| Jointly and severally. | ) |
| Defendants. | ) |
| | ) |

**NOTICE OF WITHDRAWAL OF PLAINTIFF'S MOTION FOR RECONSIDERATION OF COURT ORDER REGARDING BILL OF COSTS ET SEQ. AND OF SUBPOENA ON KANE & TRAP**

NOW COMES Plaintiff, Mary Scott, by and through her attorneys Frank, Haron, Weiner and Navarro, and for her Notice of Withdrawal of Plaintiff's Motion for Reconsideration of Court Order Regarding Bills of Costs et seq. and of Subpoena on Kane & Trap, states as follows:

1. Plaintiff filed with this Court her Motion seeking reconsideration of the Order of this Court as to the assessment of costs and attorney fees to be paid by Plaintiff as part and parcel of this Court's prior granting of the Motion for Summary Judgment brought by Defendants.

2. Plaintiff stated in said Motion that Defendants' submission of a tape to the Court which combined Tape I and ½ of Tape II onto one tape (the "Combined Tape"), as the submission they had received from Mary Scott, was false and that the Combined Tape was a fake that only Defendants could have created.

3. Based on the Plaintiff's conclusion that the Combined Tape was a fake, Plaintiff served a subpoena on Kane & Trap seeking discovery of materials and information that could shed light as to what tapes Defendant had in their possession and had turned over to Kane & Trap for transcription, as well as the circumstances under which Tapes I and ½ of Tape III could have come to be combined into the Combined Tape.

4. Plaintiff's conclusion regarding Defendants' false submission to the Court appears to have been erroneous. Plaintiff's counsel sincerely regrets having reached such an erroneous conclusion, has extended apologies to defense counsel, and hereby extends apologies to the Court.

5. Plaintiff's erroneous conclusion that Defendants had made a false submission to the Court was not reached in bad faith or without a diligent inquiry into the facts. To the contrary, Plaintiff's counsel elicited substantial information from the paralegals and staff involved in the document management of this case. However, Plaintiff's counsel received incorrect information, which led to the incorrect conclusion, as follows:

A. After receiving the Court's Order concluding, among other things, that Plaintiff had intentionally withheld the 2/7/02 Tapes from Defendants, Plaintiff's counsel investigated further the circumstances underlying the production of the 2/7/02 Tapes, the existence of the Combined Tape, and the existence of a transcript secured by Defendants containing a full transcript of Tape II of the 2/7/02 meeting.

B. In consultation with the paralegals and staff involved in this case, Plaintiff's counsel gathered and listened from beginning to end to every single tape or tape copy in existence or of record in her office pertaining to the 2/7/02 meeting. Not a

single one of said tapes combined the content of Tape I and Tape II.

C. Plaintiff's counsel inquired and received repeated representations from the paralegals and staff involved in this case that the tapes referenced in 5.B. supra constituted the entire universe of 2/7/02 tapes that had ever come to be in the possession of this office or as to which there was any record in this office.

D. The foregoing representations conformed with a Master Index of Documents kept in this case, which Plaintiff's counsel personally reviewed to satisfy herself that, in fact, the tapes referenced in 2.A. supra constituted the entire universe of 2/7/02 tapes that had ever come to be in the possession of this office or as to which there was any record in this office.

E. Based on the foregoing, Plaintiff's counsel concluded that the Combined Tape that Defendants' submitted to the Court did not come from Plaintiff and could have only been prepared by Defendants. Said conclusion was communicated to the Court in the Motion for Reconsideration.

6. In response, Defendants produced Exhibit A4, which purports to be a copy of a large cassette tape hand-marked "Scott v. Metro 2/7/02 Meeting Minutes Enterprise Bd" bearing Defendants' bates-stamp number 26-00680 and no bates-stamp number from Plaintiff (the "Large Cassette Tape").

Defendants represented that the CD they submitted to the Court is an exact replica of the Large Cassette Tape and that the Large Cassette Tape combines Tape I and ½ of Tape II.

5. Regrettably, Plaintiff's counsel's records in this case contain no trace whatsoever of the Large Cassette Tape ever being received by this office or ever being produced to Defendants.

6. Notwithstanding, the hand-marking of the large Cassette Tape, as reproduced in Exhibit A4 and after being examined by Plaintiff's counsel, resembles the hand-writing of paralegal Amy Brown, who like Defendant's paralegal, Kimberly S. Connor, was responsible for document management, discovery and production in this case. Ms. Brown has been questioned regarding this matter and, regrettably, has no reasonable explanation as to how such a tremendous omission could have occurred in this case. Indeed, she has no reasonable explanation as to why this office has no record of the Large Cassette Tape ever being in existence, ever being received by this office, or ever being mailed to Defendants. If, in fact, the handwriting at issue is that of Ms. Brown (she has not been able to confirm whether it is or is not), the only possible explanation to the matter is that Ms. Brown mailed to Defendants the only copy of the Large Cassette Tape in the possession of this office, without making a record of it, without making a record of its contents and without making a copy of it for this office's records.

7. In light of the foregoing, there is no longer a basis to seek information and documentation in the possession of Kane & Trap and that subpoena will be withdrawn.

8. Plaintiff's counsel realizes that it is responsible for the conduct, omissions, or commissions, of its support staff and, therefore, will take steps to ensure that such terrible errors and omissions never repeat themselves. Plaintiff's counsel reiterates however, that all of the information available at the time that the Motion for Reconsideration was submitted to the Court, supported no conclusion other than what which was presented to the Court. Unfortunately, despite acting in good faith and based on information which appeared to be accurate at the time, Plaintiff's counsel was misled by information that turned out not to be reliable.

9. Although these errors and omissions only affect the Rule 26 sanctions portion of the Motion for Reconsideration, the magnitude of the error is such that Plaintiff will withdraw the entire Motion for Reconsideration. The merits of the Court's decision will be addressed anew on the pending appeal based on the information that is now available to Plaintiff's counsel.

10. Again, Plaintiff's counsel sincerely apologizes to the Court and to defense counsel for this regrettable and unforeseeable situation.

Respectfully submitted,

FRANK, HARON
WEINER and NAVARRO

/s/ Monica P. Navarro
David L. Haron (P14655)
J. Laevin Weiner (P22108)
Monica P. Navarro (P52985)
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5435 Corporate Dr, Ste 225
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Dated:October 31, 2005 (248) 952-0400

## APPENDIX 3

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**No. 1:02-cv-485**

**[Filed May 13, 2005]**

UNITED STATES OF AMERICA ex rel. MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORP. d/b/a METROPOLITAN HOSPITAL, a Michigan corporation, and MICHAEL FAAS,
Defendants.

**EXHIBIT E TO BRIEF IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT**

## AFFIDAVIT OF SANDRA L. SEFTON

Sandra L. Sefton, being first duly sworn, deposes and says:

1. I am employed at Metropolitan Hospital as the Chief People Officer for Metropolitan Hospital (the "CPO"). My responsibilities are similar to those held by any chief human resources professional in an organization employing more than 2000 people. I have the direct responsibility for a variety of departments and services, some of which are located at the hospital and some of which are located at Metro Health's Breton Plaza location. Those activities include the HR division, employee health and safety, environmental services, volunteers, public relations, and management education. I was the CPO during Mary Scott's tenure with Metropolitan.

2. In my role as CPO, I was able to observe the relationship that Mary Scott had with her peers, direct reports and other Metropolitan personnel and I received frequent comment from Scott's peers and others about Scott's interactions and working relationship with them. Scott did not work well with others and had difficulty within the Senior Leadership of the organization. Her ability to communicate and work with others without causing offense was as limited as I have seen in anyone with whom I have worked and substantially worse than any executive with whom I have worked. Her comments and emails were often caustic, her

interactions in meetings were frequently combative and defensive, and she transformed professional disagreements into personal attacks, both in her perception of the motive of the person who was disagreeing with her and her own response. In the course of this litigation I have seen a number of emails that Scott sent to others which exemplify my point.

3. In fact, as early as 2000, I recommended to Mike Faas that Scott be required to participate in psychological counseling because of the issues she was creating within the workforce (Exhibit 1). Each year approximately 40 to 50 managers, directors, vice presidents and senior vice presidents of Metropolitan attend a management retreat at Barothy which is a lodge north west of Grand Rapids. At the 2000 Barothy retreat, Scott arranged to have all her direct reports in the same cabin as demonstrated in Exhibit 2, which was kept in the course of our regularly conducted business activity and it was our regular practice in this business activity to make and keep this kind of record. I was later told by the direct reports that Scott would not allow them to attend the evening functions contrary to the purpose of this event which was to build relationships with managers from other areas of the organization and develop camaraderie. The employees told me that they felt like they were treated like children and I was concerned about the over-all effect that it had when one of the four senior vice presidents of the organization would not allow

"her employees" to participate in such harmless adult activities.

4. Additionally, in early December of that year one of Scott's direct reports, Cheryl DeVries, came to me to complain that Scott had hired one of her (Scott's) neighbors to work at White & White – a Metropolitan affiliate that Scott was managing at the time. The neighbor had no experience for the job and was being paid at Scott's direction as if she were a supervisor when she could not even do the job. DeVries complained to me about the new hire because she was concerned that the hiring occurred outside of the Human Resource Hiring and Compensation process. After DeVries spoke with me, Scott reprimanded her for coming to Human Resources. I knew Scott had terminated Derrick Byl and had difficulties with Jerry Irvine and others within the organization, and I was concerned that her behavior was divisive and damaging to the organization. I passed these concerns along to Mike Faas.

5. Scott had an ongoing feud with Tim Crowley – the COO of the hospital who joined Metropolitan in 1999 – which was permeating not only their emails but was affecting the Senior Leadership Team. The Senior Leadership Team at Metropolitan was small since there was only a president (Mike Faas) and three senior vice presidents (two of the senior VP's being Scott and Crowley). That two of the senior vice presidents were having so much trouble working

with each other was creating a sense of disunity that was permeating the rest of the organization.

6. In early 2001, I had discussions with Mike Faas, the president CEO of Metropolitan, who was concerned that Scott's conflicts with her peers – particularly with Tim Crowley – were becoming pervasive and that outside intervention was necessary for us to all work together in planning for a new hospital that Metropolitan was trying to build. In fact, I received an email and a memorandum from Scott that detailed all the professional and personal faults regarding Tim Crowley which is attached as Exhibit 3. At Mr. Faas' request, I telephoned and later met with Rita Amell, from Right Management, on June 15, 2001. We discussed an assessment process that could help us identify the individual and group strengths and weaknesses of the organization and its senior leadership, address the problems being created by Crowley and Scott, and prepare the organization's leadership for the challenges of developing, building and moving to the new campus. Right Management gave me a proposal which was approved by Faas in August of 2001 with the implementation to begin in the fall of 2001 (Exhibit 4).

7. Also, on September 17, 2001, a Yarrow retreat was organized specifically to deal with conflict in the senior leadership group; the program outline for this retreat is attached as Exhibit 5, which was kept in the course of our regularly conducted business activity. It was our regular practice in this business

activity to make and keep this kind of record. While it was not announced as such, the problems we were addressing were those associated with the relationship between Tim Crowley and Mary Scott. Ms. Scott was unable to attend because she had taken a vacation overseas and all planes were grounded because of the events of September 11.

8. Scott was not present at this retreat. Therefore, we were able to have an honest discussion about her impact on the organization. On the bus ride home, many of the participants discussed Scott's behavior and agreed that she was the source of the conflict within the Senior Leadership team.

9. Scott continued to have issues with others in the organization such as Tim Susterich; attached as Exhibit 6 is an email I received from Mary Scott.

10. In October of 2001, Metropolitan had its annual Barothy retreat. The retreat is for employees at the manager level and above and is designed to build relationships with others in the organization. In 2000, Scott had most of her direct reports assigned to her cabin and prevented them from joining in the social activities which where intended to build relationships and foster camaraderie. While at the annual Barothy retreat, I announced to the managers that we would start an assessment process of senior leadership through Right Management. I told the people at the meeting that each direct report would respond to questions about their boss as part of an Organizational Cultural Inventory ("OCI").

11. On October 22, 2001, Kim Speese, Cheryl DeVries and Marie Bengsch, who were three of Scott's direct reports, came to me expressing their concern that they would be identified by participating in the assessment process. They told me that there were only 8 of them who would be providing responses concerning Scott and her area and they knew that Scott responded very negatively to any type of criticism. They told me that if the report was negative in any way, that Scott would retaliate against them and that they did not want to participate and risk their jobs. I shared these concerns with Mike Faas and he told me to reassure them that nothing would happen to them as a result of participating in the assessment process. As a result, I prepared letters of protection for them on my home computer. I told them I would keep the letters at home as an additional precaution, but I assured them that they would not be terminated for honestly evaluating their boss.

12. The OCI assessments were supposed to be completed by November 6, 2001, and Educational Specialist, Jennifer McClintock sent an email reminding the participants to have their direct reports complete and return them to her for mailing to Right Management; that email is attached as Exhibit 7.

13. In late January, 2002, I attended a meeting at the Peninsular Club in Grand Rapids where Ms. Amell announced and reviewed with the Senior

Leadership group the results of the OCI for the organization. Subunit reports were to be reviewed by each of the individual VP's with Ms. Amell. At or about the same time Ms. Amell also informed the participants about the process for the Compass 360, lifestyles inventory, and Myers Briggs tests, which were also a part of the protocol. The Compass 360 was to be completed on and by the CEO, who would also do one for all the senior VP's. The senior VP's were to have each of the other senior vice presidents evaluate them and that the remainder of the evaluation forms could be given to anyone who had worked with the VP for at least one year. Each VP then was given the Compass forms to deliver to the persons completing the assessment for them. When several of Scott's direct reports were asked by her to fill out the Compass 360, Speese, DeVries and Bengsch came to me and sought actual copies of the Letters of Protection which I had prepared on my home computer. In accordance with their requests, I printed out the letters at that time and brought them copies of the letters (Exhibit 8).

14. Beginning on January 25 and continuing through February 11, 2002, Rita Amell met with me and each of the Senior VP's to discuss the results of the OCI assessment with them. Scott told me that she met with Amell on February 6, 2002. Kim Speese came to me that same day and told me that after Scott's meeting with Amell, Scott had called Speese on the telephone and was very upset. Speese told me that Scott had asked her to set up a meeting for February 7th with Scott's direct reports to review

these findings and to write a letter to Amell disputing the results. At approximately 5:15 p.m. the same day, I received a phone call from Scott. She said she had received her OCI results and was very distressed with the results. Scott said the tool was incorrect and did not depict her or her division; my contemporaneous handwritten notes of this meeting are attached as Exhibit 9.

15. The next day, February 7, 2002, Scott met with me and stated that she wanted Right Management to redo the OCI for her group. She told me that she was going to get her direct reports together to determine how the questions were answered and ask them if they felt the OCI was descriptive of their group. I explained to Scott that this was only one part of the process and we needed to complete the process and then work towards improving the Senior Leadership team. At about 1:30 p.m., Scott asked me to come to the President's Conference Room where her team was gathered. In my presence, Scott stated the team did not evaluate their division correctly and then she left. It appeared to me from the body language of the group that they were visibly upset. I explained that there were no right or wrong answers and that the OCI was one part of a tool to evaluate senior management and the organization as a whole. The OCI was only one part of the assessment and not the complete process. I told them not to do anything further on this issue at this point of the process. My contemporaneous notes documenting the occurrences of this day are attached as Exhibit 10.

16. After the meeting, Scott came to my office pointing her finger at me and threatening to take legal action against the organization. Scott indicated the test results were not correct and that the OCI did not describe the team or her. Scott told me that "she's not dysfunctional or neurotic." I explained that all of Senior Leadership was involved in this process, that the tool was administered by a neutral third party, and that she should let the process be completed. I did encourage her to put her concerns in writing to Mike Faas and me; my contemporaneous handwritten notes of this meeting are attached as Exhibit 11. I could not understand why she was having such an inappropriate and violent reaction to the results. I relayed this conversation to Mike Faas.

17. On February 8, 2002, Cheryl DeVries came to me to thank me for not backing down. She stated that the OCI results described Scott perfectly. Later, Kim Speese called me so agitated that she could barely speak. Speese said she could not take it anymore because Scott was retaliating against all of her direct reports and that is exactly how Scott reacts to any type of criticism. She told me that the group knew what they were doing when they filled out the OCI and the results fit Scott perfectly; my contemporaneous handwritten notes of this meeting are attached as Exhibit 12. I sent Scott an email indicting that we need to wait until the process is completed before taking further action pursuant to instructions from Rita Amell (Exhibit 13).

18. A couple of days later while Faas, Scott, and other senior leadership were at a retreat in Florida, Speese and Bengsch came to me an began to report very inappropriate behavior by Scott. The things they reported included:

- inappropriate nighttime meetings at Scott's home, which is a long way from our office;

- stories of employees being bitten and otherwise threatened by Scott's dog at her home during required meetings with no action taken by Scott to remove the dog or care for the wounds of the employees who were bitten;

- employees were asked to lie about a prospective hire's credentials;

- Scott was attempting to thwart the assimilation process for the new Chief Financial Officer into Metropolitan;

- Scott had characterized Mike Faas as a "demon" and "a liar" in her comments to staff members; and,

- Speese and Mark VanderJagt felt that they were forced to attend Bible studies with Scott at work.

19. Both Speese and Bengsch asked to be reassigned from Scott; my contemporaneous handwritten notes of my meetings with them are attached as Exhibit 14. They told me that they and others were afraid to come forward earlier for fear of losing their jobs. Later, Speese and Bengsch returned to see me, this time with Cheryl DeVries, to discuss how to handle Scott regarding the OCI and asking why management was not addressing the issue. I reassured all three of them that Scott would not be permitted to abuse employees and that the matter would be handled when Faas returned. Since Mr. Faas was out of town, I telephoned him and reported all of these concerns to him. I told him that I perceived that the staff was really fearful and was intimidated by Scott's behavior. He asked me to have some options for dealing with the situation laid out by the time he returned to town. Dr. Belsito and I met to develop some options to discuss with Faas upon his return; my contemporaneous handwritten notes of this meeting are attached as Exhibit 15.

20. On February 25th, Mary Grant and Kim Speese asked me if Faas realized the seriousness of the situation, asked to speak to him directly, and wanted to know what actions would be taken regarding Scott. I assured them that I had spoken with Faas myself that very morning and that a suggested course of action would be developed and reviewed with Faas; my contemporaneous handwritten notes are attached as Exhibit 9.

21. On February 26, 2002, I prepared a memo to Mike Faas outlining the issues and concerns of Scott's staff, their concern about a "hostile environment" and Scott's poor interpersonal skills. A copy of my memo is attached to this affidavit (Exhibit 16). At that time, I recommended several options. I said that we could reorganize and remove all direct reports from Scott, give Scott special projects without staff or develop a behavioral contract. I suggest that if we did nothing that I thought it carried a high risk. I also gave Faas the option of terminating Scott and offering her a severance package. I also informed him that some of Scott's staff members were afraid of losing their jobs, could no longer tolerate her behavior, were having physical symptoms from the stress, and wanted to no longer report to Scott. Faas indicated that he wanted to remove her from supervising anyone, but also indicated that he really preferred dealing with these problems as part of a complete reorganization that he had planned and did not tell me that day exactly what he was going to do or when he was going to do it. He instructed me to assure Scott's staff that he was working on a solution.

22. Karen Meinke was in charge of the MSO. She reported to Scott. Early in March, Karen Meinke came to discuss a memo she received from Scott outlining issues and proposing a reorganization which would change Meinke and Mary Ann Reach's role within the MSO. Reach reported to Meinke. The memo indicated that Scott was going to assign Lisa Kaywood to audit functions within the MSO and

change the reporting structure such that Reach, who was Kaywood's current supervisor, would actually end up reporting to Kaywood. Meinke told me she had discussed these issues with Dr. Belsito, who had disagreed with the proposal and had confronted Scott about the proposed changes. It was after Scott learned that Meinke had gone to Dr. Belsito that Meinke received the March 7th memo. Perhaps to bolster her decision to make these changes, Scott then hired the accounting firm of Plante Moran to do a study on the MSO.

23. During the month of March, I received ongoing complaints from Mary Scott's direct reports regarding Scott's inappropriate and retaliatory behavior. In my discussions with Faas, it was decided that there were several options. We could move Scott to special projects such as the relationship with the ongoing discussions with Borgess and St. Mary's, or we could use her as an internal and external consultant reporting to Faas and Smedes. Under no circumstance would Scott have supervisory responsibility for anyone else in the organization. In the alternative, Scott could be terminated from the organization. Because there were also ongoing issues with Tim Crowley, I knew that Faas did not want to handle the issue piecemeal, but we eventually decided that we had to do something in the interim with Mary Scott.

24. In April 2002, Kim Speese came to me. She told me that her reason for coming was because she received a memo from Scott regarding Scott's

expectations for Speese's performance of her job duties. Speese told me that Scott had sent her a memo (Exhibit 18), which Speese perceived to be in retaliation for not being able to get the OCI redone and leaving a meeting to secure documents for Dr. Belsito.

25. In mid-April Faas instructed me to meet with Scott after she and I met together with Right Management to review the results of the Compass 360 on April 17, 2002. Scott and I stayed in their conference room and I told her about the new organizational design and her changing role as Faas had outlined it to me. Mary Scott would have no direct reports and would only manage the relationship with Borgess. I told her that if she did not want this new role, she would have to resign from the organization; my contemporaneous handwritten notes of this meeting are attached as Exhibit 19. My meeting with Scott occurred at approximately 10:30 a.m., immediately after we had concluded our earlier meeting with Ms. Amell. Faas had prepared a memo announcing the change to the organization to be sent on April 22, 2002. I received and reviewed this reorganization at the strategic planning meeting on April 22. Scott was absent from that meeting. Faas had told me he intended her assignment to the Borgess relationship to be very short-lived and that he planned for her to be gone from the organization within a couple of months. A few days after this, however, Faas told me the reorganization was on hold, but he did not tell me why.

26. On April 26, 2002, I relayed to Bengsch, DeVries, and Meinke separately that the reorganization was on hold; my contemporaneous handwritten notes of this meeting are attached as Exhibit 20. Each asked me if Scott was suing Faas. Bengsch told me Scott has been collecting information on him for a long time. I explained that I did not know why the reorganization was being delayed, which was true. Later that day, Diane Wiest, Scott's administrative assistant called me to tell me that Scott had shared information with her at lunch earlier in the week and she was concerned about what Scott told her; my contemporaneous handwritten notes of this meeting are attached as Exhibit 21. Wiest told me that Scott requested the minutes of the February 7, 2002, Enterprise Board meeting and the original tapes and Wiest was concerned that, if the minutes were changed, her name would be on them as the recording secretary.

27. On April 29, I informed Mary Grant that the reorganization was being placed on hold. She asked if she could work for Smedes and started crying; my contemporaneous handwritten notes of this meeting are attached as Exhibit 22. I encouraged Grant to contact our Employee Assistance Program. I then received a call from Elaine Griffiths, the Chief Nursing Officer. Griffiths informed me that Scott met with her the week before and that she believed Scott's behavior was very strange in the way she conducted herself. Griffiths indicated it was the first time she and Scott had ever met one-on-one. Scott's

office was at Breton and Griffiths' was at the hospital over a mile away. Griffiths told me that Scott's behavior was ranting and raving about the April 15, 2002, meeting regarding the CON and the discussion regarding patient counts. Griffiths stated she did not feel the CON meeting was inappropriate and that Scott took some of the comments totally out of context. Griffiths said she was reporting to me about this because she was concerned that Scott's behavior was unbalanced, alarming and "delusional;" my contemporaneous handwritten notes of this meeting are attached as Exhibit 23.

28. A telephone conference was scheduled with Plante Moran on April 29, 2002 with, Mark VanderJagt, Mary Scott and me. Plante Moran and VanderJagt were participating by telephone. Shortly after the meeting began, Scott left and came back with a tape recorder. She placed it on the table without telling those who were participating by telephone. I stopped the conversation and informed the participants that they were being recorded. Scott angrily told me she could tape any conversation that she was a party to. I repeated that we do not tape our partners without their knowledge, to which the consultant responded it was acceptable to tape the conversation. On that same day, Dr. Cunningham reported to me that he had seen a tape recorder in Scott's handbag at the prior Senior Leadership meeting. I reported both of these events to Attorney Jeff Fraser, our employment lawyer, because I was very concerned about having one of our employees taping conversations without

the knowledge of those who participated; my contemporaneous handwritten notes of this meeting are attached as Exhibit 24.

29. On or about April 30, 2002, I told Kim Speese that the reorganization was being placed on hold and Speese told me that Scott was suing Faas. Speese also told me that Scott had made a very threatening remark to her. She said that Dr. Belsito had interrupted a meeting Speese was participating in with Scott. He apparently asked her to locate a document that he needed. So she left to get the document and upon returning was told by Scott that she was not showing her the appropriate respect and that it would be "a fatal mistake" for Speese to think that she reported to Dr. Belsito; my contemporaneous handwritten notes of this meeting are attached as Exhibit 25. On May 2, 2002, I met with Attorney Fraser, who informed me that both an employment and compliance investigation were taking place at Metropolitan and asked me to sign a protocol regarding the investigation (Exhibit 26). This was the first time anyone told me what was going on. At this meeting I informed Attorney Fraser of the April 17 meeting in which I told Mary Scott that she was being reassigned and would have no direct reports or that she would have to resign from the organization. I discussed a variety of issues with Fraser including compensation, salary, bonuses, titles, policies and a number of employment issues. I explained to Fraser that the executive bonuses were a percentage of their total

compensation and given at the discretion of the CEO.

31. In my discussions with Fraser I:

- provided him with general salary information for the senior executives,
- told him about the Yarrow team building retreat,
- described the reasons that Metropolitan had utilized the OCI and other assessment tools,
- described the infighting between Mary Scott and COO Tim Crowley and how it was filtering down into other parts of the organization.

I went on to describe:

- Scott's highly inappropriate reaction when the OCI results came back,
- Scott's interaction with her direct reports,
- Scott's attempts to interfere with the assimilation of new CFO Robert Smedes into the organization, and

- I gave him information I had received from Scott's direct reports regarding a "hostile work" environment.

I also provided him with my contemporaneous notes from meetings with Scott's direct reports beginning in February of 2002 and continuing to the date of our meeting on May 2, 2002. I also told him that Faas intended to give Scott the choice between being reassigned to the Borgess/Metro merger (with no direct reports) or be terminated from the organization. I told Attorney Fraser I had communicated that to Scott on the morning of April 17, 2002.

32. During the month of May, I continued to hear concerns from Scott's direct reports regarding their scheduled conferences with Attorney Fraser. They wanted assurances that there would be no repercussions from Scott if they talked honestly with Fraser; my contemporaneous handwritten notes of this meeting are attached as Exhibit 27. I informed the staff that Fraser was in charge of dealing with Scott and I could only pass along the information. Marie Bengsch reported to me that Scott was claiming Scott would never report to Faas that she's been collecting data on him forever. Bengsch expressed to me concern about the continuing "hostile environment" created by Scott. Bengsch reported to me that Scott was telling her direct reports she was "going to blow things up" and that she was going to have them talk with Attorney Fraser; my contemporaneous handwritten notes of

this meeting are attached as Exhibit 28. Diane Wiest told me she was concerned about being made a confidant by Scott. Linda Sloat reported to me that she came in on a Sunday when there were no cars in the adjacent parking lots. She said she heard noises and found Scott and her husband in Scott's office with no lights on but Scott working on her computer. Sloat said she reported the incident to me because she was suspicious that something inappropriate was going on. I in turn reported this information to Fraser.

33. I kept notes which were taken contemporaneously with my meetings with the direct reports beginning in February of 2002 and continuing until Scott was placed on leave. Both Speese and DeVries had over time been keeping written outlines chronicling the events that had been occurring since October of 2001 and continuing through May (Exhibit 29). I was informed on June 12, 2002, that the Executive Committee was placing Scott on Administrative leave. I arranged for John Lee, a psychologist, to meet with Scott's direct reports due to what they characterized as a stressful work environment. I was extremely relieved when Scott was placed on administrative leave.

34. In my opinion, Scott should have been removed from the organization in April. The numerous reports and complaints that I received from members of her staff about her treatment of them combined with my observation of her insubordinate and insulting remarks about Mr. Faas

and Mr. Smedes, my observation of the ongoing arguments she had with Crowley and others in senior management, and the apparent negative impact she was having on her peers, direct reports and others, as perceived by me through the comments and conversations described in this affidavit, had prompted me to suggest to Mr. Faas several months earlier that removing her was a viable and perhaps desirable option. The information and complaints about retaliatory and threatening behavior that I continued to receive in March and early April (which I reported to Mr. Faas) confirmed in my mind that Scott should be removed from the organization as soon as possible. Had Scott not made her allegations against Mr. Faas and about compliance violations, she would have been removed from management during April and, I believe, terminated from the organization very shortly after that. Her reporting activity triggered internal investigations that interrupted that process which was already underway. Although I was not involved in the decision to place her on administrative leave, I am certain that she would never have been able to return to Metropolitan without a tremendous loss of staff at the senior level and below. I believe that the decision to place her on administrative leave, and the later decision to terminate her from the organization, were the only decisions that the organization could have made in light of the outrageous conduct, complete alienation of executive and senior leadership, and the complete loss of trust and confidence in Mary Scott as exemplified by the

observations and conversations I made and received, as discussed in this affidavit.

35. I have personal knowledge of the facts stated in this affidavit and, if sworn as a witness, I am competent to testify to them.

AFFIANT SAYS NOTHING FURTHER.

/s/_____
Sandra L. Sefton

Subscribed and sworn to before me this 12th day of May, 2005.

/s/_____
Notary Public
Kent County, Michigan
Acting in Kent County, Michigan.
My Commission expires:
9/16/2005

## APPENDIX 4

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**No. 1:02-cv-485**

**[Filed May 13, 2005]**

UNITED STATES OF AMERICA ex rel. MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORP. d/b/a METROPOLITAN HOSPITAL, a Michigan corporation, and MICHAEL FAAS,
Defendants.

**EXHIBIT L TO BRIEF IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT**

## AFFIDAVIT OF JEFFREY J. FRASER

Jeffrey J. Fraser, being first duly sworn, deposes and says:

1. I am an attorney with the firm of Varnum Riddering located in Grand Rapids, Michigan. My firm has represented Metropolitan Healthcare and its other related entities for a number of years. I have helped Metropolitan regarding labor and employment law for a number of years.

2. Late in the day on April 17, 2002, I received a phone call from Mary Scott indicating that she needed to schedule a meeting regarding several significant hospital matters, but she did not disclose the exact nature of all significant matters. Over the years, I have worked with Ms. Scott on employment matters.

3. When Scott called again on the 18th, she indicated that she wanted to meet with me and her lawyer to discuss a number of issues including employment claims, financial matters, the Certificate of Need application for the new hospital and fraud/IRS issues. She did not get into any detail about any of these issues, but I understood this was a serious matter. My contemporaneous notes of that conversation are attached under tab 1. A meeting was arranged for Friday, April 19, 2002 at 6:30 pm and for Saturday, April 20, 2002 at 10:30 am.

4. During the meetings on April 19 and 20, I clarified my own and Varnum's obligations to Metropolitan Hospital and the Board. Scott indicated that she believed Michael Faas, the CEO of Metropolitan, wanted her gone. Scott shared the details of her being reassigned to Borgess with no direct reports or, in the alternative, being terminated. Scott and her attorney raised several issues which included potential employment and compliance concerns. I told Scott and her lawyer that I would advise the Board of the issues, her protected status and the need to investigate her claims. I kept contemporaneous notes before and after these meetings as well as running notes during both of these meetings. The notes are attached under tab 2.

5. In accordance with their request, I arranged for a meeting with members of the Executive Committee on Monday, April 22, 2002 so that Scott could disclose to them the issues she raised with me earlier. At this meeting (as she had done in the April 19 & 20 meetings), Scott suggested that the retired Chief Operations Officer, John Leegwater, return to the organization as the interim CEO and that Scott would act as the CFO displacing Bob Smedes, whom Metropolitan had recently hired. Scott also raised concerns about Sandy Sefton (Chief People Officer) and Chris Lawrence (Risk Management/Compliance) remaining in the organization (see attached documents under tab 3). My observation was that the Board Executive Committee took these matters seriously, moved to immediately protect Scott by having her report directly to them and discussed

bifurcating the employment claims from the compliance issues. Shortly after the meeting, I telephoned Faas and told him that Scott had made complaints to the Executive Committee regarding compliance and employment matters and that she would no longer be reporting to him, but rather, would be reporting to the Executive Committee and myself. I also told Faas that no changes regarding Scott's employment status were to be made and that he should make the hospital his primary office location during the investigation.

6. Both Faas and Scott were required to sign protocols that I prepared regarding the investigatory process which included requirements to maintain confidentiality, cooperate in the process and not to alter, modify or destroy documents. I discussed the protocol requirements with both Faas and Scott prior to their signing them. Copies of these protocols are attached under tab 4. The Board temporarily postponed all of the pending changes related to Scott's employment relationship at Metropolitan. As early as April 25, 2002, the Executive Committee, with the assistance of Varnum lawyers, began reviewing nationally recognized law firms to investigate the compliance matters. By May 7, 2002, Metropolitan had engaged the Firm of Epstein Becker & Green, a Washington D.C. law firm, to conduct an investigation into the compliance matters which Scott raised and to report to the Executive Committee. With respect to the employment matters Scott had raised, I was to conduct an investigation for Metropolitan and advise the Board.

7. Shortly after I initiated the investigation, I learned from Scott that she had tapes from a number of meetings and/or encounters with other Metropolitan Hospital leaders. I told Scott she had to stop taping conversations at Metropolitan, since we had now begun the employment investigation (see attached my contemporaneous notes of both April 22 and April 25 under tab 5). During late April 2002, Sandy Sefton contacted me, indicating that Scott had attempted to tape a meeting with one of Metropolitan's consultants, Plante Moran, without advising them that she was taping the telephone conversation. Sefton told me that it appeared Scott had also taped the senior leadership meeting which had occurred earlier in the week.

8. On May 15, 2002, I interviewed Elaine Griffiths, Chief Nursing Officer, related to Scott's employment allegations. Griffiths stated that Scott came to her after a meeting on April 15, 2002, concerning the Certificate of Need for a new hospital. Griffiths told me that Scott had characterized Metropolitan's actions during the meeting as fraudulent and manipulative. She also said that Scott had referred to Faas as "evil" and having an "Adolph Hitler personality." Griffiths had attended the same meeting and told me that she did not believe that anything fraudulent or inappropriate had occurred. Griffiths said Scott's comments about Faas surprised her because Faas had done a lot to retain Scott even in the face of criticism about Scott. Griffiths stated she was very concerned about Scott's

mental status at that point. Griffiths said that when she told Scott that she did not believe that anything that had been said or done at the meeting was inappropriate, Scott left her office. Copies of my running notes and Griffiths' signed protocol are attached to this affidavit under tab 6.

9. As a part of my investigation into the employment claims, I began to gather data regarding the Supplemental Employee Retirement Plan ("SERP"), and about equal pay and other employment issues Scott raised. I interviewed Sandy Sefton, Metropolitan's Chief People Officer. Ms. Sefton:

- provided me with general salary information for the senior executives,
- told me about the Yarrow team building retreat,
- described the reasons that Metropolitan had utilized the OCI and other assessment tools,
- described the infighting between Mary Scott and COO Tim Crowley and how it was filtering down into other parts of the organization.
- gave me information she had received from Scott's direct reports regarding a "hostile work" environment.

Sefton went on to describe:

- Scott's highly inappropriate reaction when the OCI results came back,

- Scott's interaction with her direct reports,

- Scott's attempts to interfere with the assimilation of new CFO Robert Smedes into the organization, and

Sefton provided me with her notes from meetings with Scott's direct reports beginning in February of 2002 and continuing to the date of our meeting on May 2, 2002. Sefton informed me that she made her notes at the various times she was meeting with Scott's direct reports and copies of those notes are attached to this affidavit under tab 7. Sefton also told me that Faas intended to give Scott the choice between being reassigned to the Borgess/Metro merger (with no direct reports) or be terminated from the organization. Sefton told me she had communicated that to Scott on the morning of April 17, 2002.

10. During the beginning of May 2002, I learned that tape recordings of Board meetings, Faas' laptop computer and some of his files were missing from the organization.

11. As I began to look into the employment claims, Scott suggested that I interview several of her direct reports. Scott indicated she wanted me to do this because she was concerned that Mike Faas would allege she had performance and interpersonal communication deficiencies. Scott gave me several names. I asked her to rate these individuals as favorable, unfavorable, or unsure. Scott indicated I would probably hear similar favorable comments from all of her direct reports (see attached May 10, 2002 memo which I received from Scott under tab 8). The list included Mark VanderJagt, Kim Speese, Cheryl DeVries, Diane Wiest, Marie Bengsch, Mary Grant, Karen Meinke and others. Pursuant to Scott's request, I began to interview some of the direct reports she specifically suggested. I instructed Scott that she could tell these direct reports that I would be making contact but not to discuss any specifics with them.

12. During my discussions with Speese, DeVries, VanderJagt and Wiest, I learned that Scott manipulated her direct reports related to the OCI, they were afraid Scott would retaliate if the results were negative, and Scott's negative comments about and her interference with the assimilation of Smedes into the organization. Speese told me that Scott's dog had bitten her, that Scott had not offered any type of first aid and that Scott acted like it had not happened. Instead, Scott wanted Speese to play with the dog. Speese also told me that when the OCI results came back and were negative, that Scott blamed her and then issued Speese disciplinary

action regarding her performance. Speese gave me a copy of what she told me were notes she had been keeping since February 6, 2002. I also documented my conversation with Speese at the time and my notes as well as a copy of Speese notes are attached to this affidavit under tab 9.

13.I met with Cheryl DeVries on May 17, 2002. DeVries informed me that Scott told her that the meeting was about Smedes not being qualified for the CFO position because he was not a CPA, did not have a Masters Degree or any hospital experience and was Faas' friend. DeVries informed me of a number of issues regarding Scott's management style including Scott's manipulation of the OCI both before and after the assessment was completed, mandatory meetings at her home, Scott's dog sitting at her feet and growling while DeVries attended the mandatory meetings, Scott's disciplinary action against DeVries because she complained to Sefton about Scott's failure to follow the HR protocol, Scott's attempt to manipulate and derail Bob Smedes' assimilation into the organization, and the general fear within Scott's department regarding Scott's manipulative and retaliatory behavior. DeVries told me that Scott had told her that Smedes was not the "real issue" and that there were much bigger issues, so Scott had hired a "big league lawyer" from Detroit. DeVries said Scott had also told her this was all "God's plan" and that God had directed her to do this. When I met with DeVries, she gave me a copy of the notes she had been making since announcement of the OCI until our meeting. DeVries

indicated the notes were written at the time of the events. DeVries also gave me a copy of the disciplinary memo Scott wrote to her, but did not place in DeVries' personnel file. I have attached copies of DeVries documents as well as my notes from our meeting under tab 10.

14. During the same period that I was conducting these employee interviews at Scott's request, Sefton reported to me that Linda Sloat, an employee, had been in the Metropolitan offices on a Sunday to prepare for a conference. Sefton said that Sloat had reported that when she arrived at the office, the parking lot was empty and all the lights in the office were out, but that she had found Scott and her husband working on two computers in the office with all the lights off. Sloat was suspicious of their behavior and reported this to Sefton and put her observations in writing. I received a copy of Sloat's written documentation regarding this event from Sefton (see attached documents under tab 11).

15. I interviewed Diane Wiest, Scott's administrative assistant, on May 21, 2002. Wiest was concerned because Scott had shared with her on April 23 that she had raised claims with the Executive Committee about federal and state violations and told Wiest they involved six different agencies and included criminal violations. Wiest also reported that Scott had told her about being given the option to be reassigned to the Borgess/Metro project or be terminated. Wiest further reported that Scott had told her that she had been gathering

documents for years because she did not trust Faas and thought he was a liar. Wiest told me that Scott was critical of others in the organization including Sefton, Crowley, and Susterich. Wiest said she felt it was inappropriate for Scott to be sharing this type of information about senior leadership with her. Wiest appeared uncomfortable with the position that Scott's disclosures were putting her in. Wiest also told me that Scott had said that I did not like Faas and that this was the reason she decided to come to me with her complaints. She said Scott told her, "Mike's goose is cooked, I have all the cards; they can't touch me." My contemporaneous notes from my meeting with Wiest are attached under tab 12.

16. Wiest then disclosed that she was concerned about the February 7, 2002 Enterprises Board minutes which she had recently completed. She said that after she completed preparing the minutes, Scott had asked her to email them to her and that Wiest did on April 24, 2002. Wiest said that the very next day, upon returning from lunch, she found Scott in Wiest's office looking through her desk drawers. Scott then asked Wiest for the tapes, stating she thought that the minutes were not accurate, and Wiest said she gave three tapes to Scott. The February meeting was recorded on the tapes. As a precautionary measure, Wiest emailed the minutes she had prepared to Sandy Avery, another administrative assistant. Wiest provided me with a copy of the minutes she had typed regarding the February 7th Enterprises meeting, the email to Scott

and her email to Avery attaching a copy of those minutes (see attached documents under tab 13).

17. Wiest told me that Scott had directed her to copy materials but not to let Faas see her do it, and that Wiest said she observed Scott standing outside closed office doors trying to eavesdrop on other people's conversations. Wiest said that Scott's direct reports had many issues and concerns regarding Scott's management style. Finally, Wiest told me that shortly before coming to my office, Scott had told her that this was no time for Wiest to be offering constructive criticism about Scott and that this was "spiritual warfare." I told Wiest just to keep doing her job and to keep me informed of any issues or concerns that came up. Wiest signed a protocol which I have attached under tab 14.

18. Around May 20, 2002, because of the employment investigation, I advised Scott not to gather documents that were not in her physical possession. I did this because I had been hearing from some of Scott's staff that she was asking them to gather documents for her. I instructed Scott just to do her job and to let Epstein Becker and Chris Lawrence handle the compliance investigation. I also spoke with Carrie Valiant, the attorney at Epstein Becker overseeing the investigation, at this time to be sure that Valiant had not instructed Scott to gather documents as set forth in my May 20th notes which are attached under tab 15. I confirmed with Valiant that I had instructed Scott not to gather any more documents. I asked Valiant to speak with Scott

and make clear to her that she was not running the compliance investigation, but that Epstein Becker was doing that.

19. On May 28, 2002, I received a telephone call from Wiest stating she had received the Enterprises Board minutes back from Scott and that they had been altered. Wiest stated that a discussion regarding the Physician Compensation Model, its development by outside consultants, and legal review had been removed and that Scott had inserted into the minutes a discussion to the effect that Scott had requested an outside legal review of the Physician Compensation Model. Wiest also indicated that the motion to approve the Compensation Model which Dr. Cunningham had made and which Scott had supported, had been removed from the minutes. Wiest faxed me a copy of Scott's email to her and the revised minutes which I have attached under tab 16. Wiest insisted that the minutes were accurate as she had originally typed them. On May 29th, I faxed a copy of both sets of minutes, which were labeled A and B, to Chris Lawrence, the Metropolitan Risk Manager/Compliance Officer (see attached fax under tab 17).

20. On May 30, 2002, I met with Mark VanderJagt, the financial director for Enterprises. He appeared to be very stressed. VanderJagt indicated he was concerned about document requests Scott was making to him to gather information that was outside of Scott's normal scope of inquiry. He

indicated to me that he was feeling very conflicted. I was disappointed and frustrated that Scott was continuing to try to gather documents after I had explicitly told her not to and had told her to leave the investigation to the independent investigators — Epstein Becker. I told VanderJagt not to give Scott any more documents but to redirect her to me if Scott asked for any additional documents. I made contemporaneous notes of my meeting with VanderJagt which are attached as well as a copy of the protocol VanderJagt signed under tab 18.

21. I then called Scott and again instructed her not to gather documents because it was creating conflict for her direct reports. During this conversation, I told Scott that she could provide documents which were under her control (i.e. those documents that she could physically touch). I instructed Scott not to ask others to gather documents for her. Under the investigation protocol, Scott had provided much data. It was time to let Epstein Becker conduct their investigation. I told Scott that she cannot put direct reports or others in a position where they are confused about their duties. I instructed Scott that her job was to do her work, not to gather data that was not in her possession. I confirmed that Epstein Becker was now responsible to gather data. During this conversation, Scott was crying and told me that "this is a bunch of shit." She ended our conversation by stating, "I will not let anyone roll over me." I have attached my contemporaneous notes of this conversation under tab 19.

22. The very next day, however, I received a phone call from VanderJagt and Wiest indicating that Scott had asked VanderJagt to gather more documents. Consistent with my direction to him, VanderJagt told Scott that I had instructed him to not give her those documents. VanderJagt stated Scott told him she was his superior and that I had no authority. VanderJagt and Wiest indicated to me they were very concerned about VanderJagt's job security as a result of his refusal to do what Scott demanded and further indicated they felt very conflicted regarding their obligations to Scott and Metropolitan. I kept contemporaneous notes of this phone conversation and my instructions to Scott which are attached under tab 20.

23. Based on everything that had occurred over the preceding weeks, I met with the Executive Committee to discuss what I perceived to be Scott's numerous protocol violations. Scott had signed and committed to abide by the protocol at the investigation outset. Scott's violations included the following: altering the February 7, 2002 minutes for the Enterprises Board meeting, countermanding the instructions I gave Scott not to place her staff in the middle by demanding that they provide her with data, breaching the confidentiality requirements through her discussions with staff, interfering with my employment investigation by asking people to lie, and creating a "hostile work" environment for her staff. I believed these issues had the significant potential to materially interfere with or impede both

my investigation and the compliance investigation. I reported these issues to the Board. For all these reasons, I concluded that Scott should not be allowed to remain in the organization while the investigation was on-going. I had serious questions about whether Scott's employment should be continued at all. I offered several options to the Board that included placing Scott on paid administrative leave or terminating her. I suggested that the leave option was probably the most appropriate at the time. The Board agreed and placed Scott on paid administrative leave on June 12, 2002.

24. I called Scott's attorney, Linn Hynds, and advised him that Metropolitan was going to place Scott on administrative leave due to her breach of the protocol which included but was not limited to document manipulation. Hynds told me that he would call Scott and ask her to leave the building. He said he would explain why she was being placed on leave.

25. After Scott was placed on administrative leave, I sent a letter to Scott's attorney raising a number of issues and concerns primarily surrounding the February 7, 2002 Enterprises minutes, her possession of the tapes for that meeting, her interactions with her direct reports regarding investigatory issues, discussions she had apparently had with Borgess, and her document gathering. I have attached under tab 21 my written communications to Scott's counsel during this period in a letter dated June 13, 2002, as well as the two

separate responses I received from Scott which are dated June 27 and July 2, 2002. In reviewing Scott's documented responses, I noted a number of discrepancies between the two documents.

26. I told both Faas and Scott at the beginning of the investigation process that they would both be under a "microscope" regarding their performance and their commitment to confidentiality. I reached the following conclusions after reviewing the documents received from Scott, reviewing my notes from my discussions with her direct reports and others concerning the employment issues Scott raised. It was apparent that Scott had violated the protocol after signing it, and had engaged in other conduct that was inexcusable even without the protocol. Several witnesses told me that Scott had met with individuals on her staff and outside the organization to discuss issues related to the investigation. DeVries confirmed for me that Scott had suggested that DeVries make certain false statements to me that would confirm Scott's statements. I verified that Scott had specifically and repeatedly asked VanderJagt to give Scott data after I had explicitly instructed Scott not to gather data that was not in her physical possession and, worse, had made threatening statements to VanderJagt in an effort to get him to release the documents to her. I found evidence that Scott had taken the Metropolitan Enterprises Board Minute meeting tapes and had either destroyed them or was hiding them – a clear interference with the investigation. It was also clear to me after interviewing others who

attended the February meeting, that Scott had revised/redacted Board minutes which Wiest had typed, inserting events that had never occurred at the meeting and deleting other events that had. For example, Scott deleted the portion of the minutes which discussed that outside consultants and Varnum had reviewed the Physician Compensation Model. Scott then inserted a paragraph claiming that she had requested outside counsel to review the Physician Compensation Model. Scott also deleted a paragraph indicating that a motion had been made and approved regarding the Metro Health Physician Compensation Model which was Attachment A and other documents. During my investigation, I sent Scott a letter dated June 13, 2002. The letter requested answers to specific questions concerning the investigation protocol and the revised February 7th Metropolitan Enterprises Board minutes which Scott sent to Wiest on May 28th. Scott sent two separate responses to my letter, one dated June 27 and another dated July 2, 2002. When I received Scott's July 2, 2002 response, I noted that Scott was placing quotation marks around some of her responses as if she were transcribing the responses from another source. I emailed Scott's Attorney Linn Hynds and inquired about the quotation marks. I specifically asked Attorney Hynds if Scott had the tapes from the February 7, 2002 Board Meeting. In a prior response, Scott had stated that she did not know the location of the tapes and indicated that the tapes may be in a desk drawer or Metropolitan may have recycled the tapes. Once again, I asked for any tape or tapes that Scott may have recently found. On

July 3, 2002, Scott provided me another response, this time indicating that she had now located one tape. On July 12, 2002, I received a copy of a partial tape and note from Scott. I listened to the tape. I confirmed that the Physician Compensation Model discussion identified in the Meeting Minutes at paragraph two was in fact discussed at the meeting and was on the tape. The tape further confirmed that Dr. Cunningham moved to approve the Physician Compensation Model motion and contains Mike Faas' statement confirming the motion being made, noting that Scott seconded the motion and noting the motion approved. Scott deleted this information from the original Meeting Minutes. Scott's deletion did not accurately reflect what I heard on the tape. During, my investigation, I asked Wiest for her recollection of the February 7, 2002 meeting. Wiest stated that she recalled that Dr. Cunningham moved the motion and that she recalled that Scott both verbally and with a non-verbal gesture supported the motion. I concluded as well that in response to my questions about her alteration of the tapes, Scott had deliberately misrepresented what had occurred — in effect, lying to try to cover up her misconduct in changing the minutes or in the alternative in an attempt to bolster her claims. Even more telling, she had withheld evidence (the tapes) and even after being asked directly to return them, she had failed to do so. I had requested the tapes from Scott and her attorney Linn Hynds in numerous emails at least three times with a July 15, 2002 deadline. To this date, I have yet to receive all the tapes; I was only given a copy of

part of one tape. I previously have attached copies of my various communications with Attorney Hynds which reflect my ongoing request for the tapes and my documentation of a July 15, 2002 deadline to receive them which is under tab 22. Scott's refusal to return what was clearly Metropolitan property and potentially important evidence for the investigation of the charges and claims she was making, further convinced me that Scott was being deceptive and could not be trusted. I concluded that whatever was on those tapes was something that Scott did not want me to hear.

27. Finally, having interviewed several of Scott's direct reports, I determined that the direct reports believed Scott played favorites, ruled with an iron fist, had no compassion and was manipulative and deceitful. There was ample evidence from several sources that Scott had attempted to manipulate her direct reports regarding the OCI and Compass 360 portions of the senior leadership assessment process that had been going on for several months. Scott also appeared to have retaliated against and threatened staff who cooperated with me and with the investigation. Based upon all of this information, I formed the opinion and belief that Scott could not function in the Metropolitan organization and should be terminated.

28. Scott continued on paid administrative leave while I completed my investigation regarding her remaining employment claims and while the compliance investigation continued. In the early fall,

I had a discussion with Mike Faas regarding what, if any, bonuses either Crowley or Scott should receive.

29. In September 2002, I had discussions with and gave updates to the Board regarding employment issues related to Scott. I reported to them all of the information I had gathered, which is summarized earlier in this affidavit and advised them of my conclusions and beliefs regarding Scott's conduct. I recommended that Metropolitan continue Scott on administrative leave for the time being for a number of reasons which included the following:

- Metropolitan was buying peace while the politically sensitive CON process was being completed, which would also help with bond financing efforts that were about to begin.

- Scott would not be economically damaged because Metropolitan continued to pay her salary.

- Scott might be needed to help finalize the compliance investigation which was not yet complete.

30. In the late fall, as the compliance investigation was being finalized, the Executive Committee asked whether it was now possible to move ahead with the reorganization plan which had been placed on hold back in April of 2002 after Scott made her initial report. After discussion, I was asked

to assist Metropolitan in crafting severance packages for the two senior executives — Crowley and Scott — whose positions were previously identified as being eliminated. I prepared substantially identical severance package proposals for both Crowley and Scott. The severance packages were presented to them on or about January 30, 2003, when their positions were eliminated and they were terminated from employment.

31. I have personal knowledge of the facts stated in this affidavit and, if sworn as a witness, I am competent to testify to them.

AFFIANT SAYS NOTHING FURTHER.

/s/_____
Jeffrey J. Fraser

Subscribed and sworn to before me this 12th day of May, 2005.

/s/_____
Notary Public
Kent County, Michigan
Acting in Kent County, Michigan.
My Commission expires: 7/29/2007

## APPENDIX 5

## UNITED STATES DISTRICT COURT
## WESTERN DISTRICT OF MICHIGAN
## SOUTHERN DIVISION

**No. 1:02-cv-485**

**[Filed August 24, 2004]**

| | |
|---|---|
| MARY SCOTT, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| METROPOLITAN HEALTH CORP. | ) |
| d/b/a METROPOLITAN HOSPITAL, | ) |
| a Michigan corporation, and | ) |
| MICHAEL FAAS, an individual, | ) |
| jointly and severally. | ) |
| Defendants. | ) |

**[Excerpt from REVISED SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL]**

* * *

[page 1]

Plaintiff, Mary Scott, by and through her attorneys, Frank, Haron, Weiner and Navarro and Mark Scott, for her complaint against Metropolitan Health Corporation d/b/a Metropolitan Hospital ("Metropolitan"), states as follows:

JURISDICTION AND VENUE

1. This is an action for retaliation under 31 U.S.C. §3729(h), also known as the False Claims Act (the "Act"), arising out of Defendants' retaliation against Plaintiff for investigating, exposing, and reporting Defendants' submission of false claims to the United States Government.

2. Under §3732 of the Act, this Court has exclusive jurisdiction over actions brought under the Act and concurrent jurisdictions over state claims arising from the transactions giving rise to the claims under the Act. Furthermore, jurisdiction over this action is conferred on this Court by 28 U.S.C. §1331 because this civil action arises under the laws of the United States.

3. This Court has supplemental jurisdiction over all other claims set forth in this Complaint because these claims are so related to the claims arising under the Federal False Claims Act

that they form part of the same case or controversy. 28 U.S.C. §1367.

4. Venue is proper in this district pursuant to §3732(a) of the Act, which provides that "any action under §3730 may be brought in any judicial district in which the Defendant or, in the case of multiple Defendants, any one Defendant can be found, resides, transacts business, or in which any act proscribed by §3729 occurred." The acts that are the subject of this action occurred in the State of Michigan within this judicial district.

## GENERAL ALLEGATIONS

### Parties and Background

5. Plaintiff Mary Scott is a resident of the state of Michigan and is a former Senior Vice-President of Metropolitan.

6. Defendant Metropolitan Health Corporation d/b/a Metropolitan Hospital ("Metropolitan") is a Michigan corporation doing business in Grand Rapids, Michigan, within this judicial district.

7. Defendant Michael Faas is a resident of Byron Center, Michigan and is the CEO and President of Metropolitan.

8. From 1996 to 1997, Plaintiff worked as a health care finance and operations consultant at

Metropolitan. In December of 1997, Plaintiff became employed by Metropolitan as a Senior Vice President of Network Development.

9. Throughout her employment with Metropolitan, Plaintiff was a member of the Senior Management Team of Metropolitan and was responsible for a variety of hospital and health system activities, including operations, strategic planning, financial management, and process improvement.

10. In June of 2001, Plaintiff assumed oversight of several hospital revenue cycle functions and departments, including patient scheduling and registration, patient financial services (hospital billing), and decision support.

* * *

[page 7]

15. Frustrated with the seeming inability to affect change within Metropolitan, Plaintiff in 1999 had begun consulting the legal counsel of Attorney Linn Hynds. In light of the egregiousness of the April 15 meeting, Plaintiff arranged a meeting for April 19, 2002 between herself, Mr. Hynds, and Metropolitan's counsel, Jeff Fraser, an attorney with the law firm of Varnum, Riddering, Schmidt & Howlett (hereinafter "Varnum Riddering"). At this meeting, Plaintiff informed Fraser of the ongoing illegal activities at Metropolitan, gave Fraser a four-

page outline entitled "Non-Exhaustive Summary of Inappropriate Business Activities at Metropolitan Health Corporation," and directly told Fraser that she had "a present intention to report" said illegal activities to all the relevant authorities, including the United States Government and the State of Michigan.

* * *

[page 8]

19. On April 23, 2002, Chairman of the Board Doyle Hayes sent a letter to Faas outlining Plaintiff's allegations and advising him that Plaintiff would now report directly to the Executive Committee. On April 29, 2002, Doyle Hayes also sent a memorandum to Plaintiff advising her that she would be maintained in her position with all her direct reports and functions unchanged and that she would report to the Executive Committee, rather than Faas, among other things.

20. Beginning on or about April 22, 2002 and continuing into June 2002, Fraser adopted the liaison role between the Board and Plaintiff. During this period, Fraser initiated daily telephone contacts with Plaintiff and Plaintiff provided Fraser with additional memoranda outlining the illegal activities. For example, on April 30, 2002, Plaintiff provided Fraser with an additional twenty-one page document entitled "Fact Summary" further documenting the improper activities at Metropolitan.

21. On or about May 6, 2002, however, Plaintiff was informed that Metropolitan had retained the law firm of Epstein, Becker, & Green ("Epstein Becker") to assist Metropolitan with the issues raised by Plaintiff and the Executive Committee instructed Plaintiff that she would be working with Epstein Becker in order to facilitate correction of these activities.

22. Accordingly, on May 15, 2002, Plaintiff had a two-hour meeting with Epstein Becker attorneys in which Plaintiff provided said attorneys with binders prepared by her containing approximately one-hundred pages of additional documentation of the illegal activities. Once again, Plaintiff notified the attorneys that, while she still had a continued intention to report the matter to the authorities, she was pleased to see that the Executive Committee was apparently acting decisively to correct all of Metropolitan's improprieties. Subsequent events, however, made it clear to Plaintiff that she had misjudged the intentions of the Executive Committee and the role/mission of the attorneys acting for the Executive Committee.

23. Plaintiff went into the May 15, 2002 meeting with Epstein Becker with the belief that the Executive Committee and Epstein Becker were, in good faith, attempting to resolve the issues of compliance that Plaintiff had exposed, when in fact the agenda of the Executive Committee and Epstein

Becker was to cover up the illegalities and thereby minimize Metropolitan's exposure. Among other things:

A. Throughout the meeting, Epstein Becker attorneys exhibited an overall antagonistic attitude to Plaintiff that was not consistent with their purported role of objective fact finders and zealous compliance lawyers.

B. Epstein Becker attorneys repeatedly told Plaintiff that her concerns were not a "big deal" because they saw this type of conduct all the time.

C. Epstein Becker refused to return to Plaintiff the binders that Plaintiff had accumulated as evidence for the illegalities, claiming that the binders were now annotated by them and, thus, could not be released to Plaintiff.

D. Throughout the meeting (and thereafter), it became clear to Plaintiff that her expressed belief that it was necessary to disclose the illegalities to the authorities and intention to do so were not appreciated by Epstein Becker, Varnum Riddering, or the Executive Committee.

24. Not surprisingly, following the May 15, 2002 meeting with Epstein Becker, Metropolitan cut Plaintiff out of the "investigation" notwithstanding the crucial role Plaintiff had played in exposing the illegal conduct and the superior knowledge and

documentation Plaintiff had assembled on the matter. Indeed, after the May 15, 2002 meeting with Epstein Becker, Plaintiff never received any additional inquiries from the attorneys, the Executive Committee or the Board and, moreover, she never received any feedback regarding her repeated reports and documentation.

25. In spite of the foregoing, Plaintiff continued to comply with the Executive Committee's original instructions in that she assemble information and documentation and continue to supply the same to the Executive Committee, Epstein Becker, and Varnum Riddering:

* * *

[page 12]

Metropolitan's Retaliation Against Plaintiff

28. An Angell Scholar at the University of Michigan where she received a B.A. in Political Science, and a Kaiser Scholar at the University of Chicago Graduate School of Business where she received her M.B.A. degree in Finance, Plaintiff's career track and accomplishments prior to and after joining Metropolitan were stellar.

* * *

[page 15]

Defamation of Plaintiff in the Workplace

43. Following Plaintiff's reports of illegalities to the Board and the Executive Committee, Metropolitan, through Faas and others, engaged in a malicious campaign to smear Plaintiff's reputation throughout the organization in an effort to discredit Plaintiff's reports of the widespread illegalities.

44. By way of illustration, rather than limitation, Faas and other executive officers of Metropolitan made the following false and defamatory representations about Plaintiff:

A. Faas and other executive officers of Metropolitan falsely told the Executive Committee and/or Plaintiff's staff that she was going to fire staff members, thus stripping Plaintiff of what once had been a strong support base for her within Metropolitan.

B. Faas and/or other executive officers of Metropolitan falsely told the Executive Committee that Plaintiff's staff needed to be reassigned away from her because Plaintiff's performance was so poor that the financial state of one of Metropolitan's subsidiaries (West Michigan Managed Services Organization, hereinafter "the MSO") would otherwise continue to deteriorate, when in fact Plaintiff's (one and only) performance evaluation at Metropolitan was very positive, as was her track record of accomplishments.

C. Faas and other executive officers of Metropolitan spread false rumors that Plaintiff, in gathering documentation for the Epstein Becker investigation, was obtaining data for improper purposes outside the scope of the Executive Committee's/Epstein Becker's instructions and/or from other departments outside her areas of oversight and thereby breaching confidentiality, when the opposite was true. Plaintiff never sought documentation either outside the scope of the issues she had been assigned in the investigation or outside her areas of responsibility and, moreover, was very sensitive to confidentiality concerns.

D. Faas and other executive officers of Metropolitan spread false rumors that Plaintiff was fabricating evidence, such as by wrongfully changing meeting minutes, allegedly in order to back up her allegations against Metropolitan, when the opposite was true.

45. On June 3, 2002, Plaintiff wrote a memorandum to the Board and attorney Fraser documenting Faas' smear campaign against her and the negative effects it was having on her staff, some of whom had been made to become insubordinate to Plaintiff as a result. Indeed, Plaintiff reported that her staff was refusing to provide her with information in areas that were her responsibility and were going around her in the performance of their duties out of belief that Plaintiff was involved in wrongful activities.

///

Plaintiff's Suspension: the "Administrative Leave"

46. On the morning of June 12, 2002, two months after Plaintiff had first exposed Faas'/Metropolitan's practices to the Executive Committee, (after two-months of Plaintiff's ongoing efforts to provide the Executive Committee, and Metropolitan's attorneys Varnum Riddering and Epstein Becker with documentation of the illegal activities) and the very next day after Plaintiff notified Metropolitan of her final submission of this documentation, Metropolitan, through attorney Fraser, told Plaintiff that she was suspended from her job and ordered her to leave Metropolitan's premises immediately on the basis of false accusations that Plaintiff had falsified evidence.

47. Not only was Plaintiff forced to leave her job, but she was forced to do so under such adverse and precipitous conditions that this act was clearly designed to give her staff and the hospital's work force the impression that the malicious and false rumors spread about Plaintiff were true and to humiliate, intimidate, and deprive Plaintiff of any opportunity to defend her integrity and reputation. Indeed,

A Plaintiff was ordered to immediately exit the workplace or else she would be "escorted out" by security personnel, at which moment Plaintiff's computer instantaneously shut itself off by Metropolitan's remote use of

7th

electronically locking out Plaintiff from access to her computer) and Plaintiff's cell phone and pager service were immediately terminated.

B. Plaintiff was ordered to return her key and security card to the building.

C. Plaintiff was ordered to not enter Metropolitan's premises under any circumstances.

D. Plaintiff was precluded from even re-entering her office to remove her personal effects. All of her pictures, personal career resources, and other personal belongings were left abandoned for everyone to see and maliciously speculate about Plaintiff's fate.

E. Plaintiff was ordered to not have any contact, personal or otherwise, with any Metropolitan employees.

F. Plaintiff was ordered to not have any contact, personal or otherwise, with any persons associated with Borgess, an institution with which Plaintiff had been affiliated for numerous years and with which Metropolitan was attempting to consummate business deals under questionable circumstances and pursuant to numerous misrepresentations which had been exposed by Plaintiff.

G. Plaintiff was ordered to not have any contact with Metropolitan officers or Board

members and was told that all communications had to be made through Varnum Riddering attorney Fraser.

48. In sum, after being maliciously defamed, Plaintiff was summarily exiled from her work, her friends, and her entire community, where she went from being a highly accomplished professional and Senior Vice President of a major hospital to being an undesirable pariah in her own community.

Metropolitan's Pretext: Additional Defamation

49. Following Plaintiff's suspension from her job, Plaintiff learned that Metropolitan officers and Varnum Riddering attorneys had disseminated additional false and defaming information about Plaintiff that was a pretext for Plaintiff's forced departure.

50. Specifically, Metropolitan officers falsely disseminated that Plaintiff had been removed from her duties because she had allegedly "falsified evidence" by improperly changing the minutes of a February 7, 2002 meeting of a Metropolitan entity by the name of Metropolitan Enterprises ("Enterprises") in order to purportedly make them inaccurate to somehow serve a personal agenda/vendetta against Metropolitan.

51. On July 2, 2002, armed with an audio-tape of the February 7, 2002 meeting and

substantial documentation, Plaintiff wrote a letter to Varnum Riddering attorney Fraser - the only person with whom Plaintiff was now allowed to communicate -which demonstrated the following:

A. Contrary to Metropolitan's representations, Plaintiff's correction of the minutes had been proper and fully within her authority.

B. Contrary to Metropolitan's representations, Plaintiff's corrections to the minutes were accurate and necessary to create a truthful record of the meeting in question.

C. The minutes, as initially drafted, had been manipulated by Faas for the consumption of the Board (which at some point later would review the meeting minutes) in that Faas had instructed Plaintiff's secretary to create minutes which suggested to the Board that Metropolitan's physician compensation model - an area that was within Plaintiff's responsibility and a huge concern to Plaintiff - had been reviewed and approved by outside counsel Varnum Riddering, which was absolutely false.

D. The minutes, as initially drafted at the direction of Faas, would have been a fraud on the Board.

52. Notwithstanding the foregoing, Metropolitan did not rescind or retract any of its retaliatory actions and defamatory statements

against Plaintiff, choosing instead to continue Plaintiff's groundless suspension (to which Metropolitan referred as an "administrative leave").

* * *

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Plaintiff's Termination

56. Metropolitan's final act of workplace retaliation act came on January 30, 2003 when, during the pendency of Plaintiff's False Claims Act lawsuit (and after continuing to preclude Plaintiff without cause from returning to the workplace) Metropolitan terminated Plaintiff's employment with Metropolitan, alleging a "management reorganization."

57. Metropolitan's management reorganization" is a pretext.

58. Plaintiff was terminated in direct retaliation for her role in exposing, reporting, and suing Metropolitan.

COUNT I - METROPOLITAN HOSPITAL
**RETALIATION - 31 U.S.C. § 3730(h)**

59. Plaintiff realleges and incorporates by reference paragraphs 1 through 58 of this Complaint.

60. Plaintiff's actions were protected activity under the False Claims Act.

61. Defendant's actions constitute unlawful retaliation in violation of the False Claims Act.

62. Defendant's actions were malicious and deliberately designed to harm Plaintiff.

63. Plaintiff has suffered and continues to suffer substantial damages as a result of Defendant's unlawful retaliation, including, but not limited to, loss of past and future wages and benefits, loss of future earning capacity, loss of career opportunities, pecuniary losses, loss of personal and professional reputation and esteem in the community, mental distress and anguish, humiliation and embarrassment, and loss of the ordinary pleasures of life.

* * *

[page 23]

WHEREFORE, Plaintiff requests that this Court enter a judgment in her favor and against Defendants in an amount to be determined at trial (but in excess of $10 million), including compensatory damages, mental and punitive damages; and litigation costs and reasonable attorney fees.

Respectfully submitted,

FRANK, HARON, WEINER AND NAVARRO

By: /s/ David L. Haron
David L. Haron (P14655)
Monica P. Navarro (P52985)
Attorneys for Plaintiff
5435 Corporate Drive, Suite 225
Troy, Michigan 48098
(248) 952-0400

Dated: August 24, 2004

JURY DEMAND

A DEMAND FOR TRIAL BY JURY IS HEREBY MADE.

## APPENDIX 6

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**No. 1:02-cv-485**

**[Filed October 10, 2005]**

MARY SCOTT,
Plaintiff,

v.

METROPOLITAN HEALTH CORP., d/b/a METROPOLITAN HOSPITAL, a Michigan corporation, and MICHAEL FAAS, an individual, jointly and severally.
Defendants.

DAVID L. HARON
J. LAEVIN WEINER
MONICA P. NAVARRO
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**[Excerpt from BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION OF AND RELIEF FROM THE COURT'S SEPTEMBER 29, 2005 ORDER REGARDING DEFENDANTS' BILL OF COSTS AND MOTION FOR ATTORNEY FEES, EXPENSES, AND NON-TAXED COSTS AS SANCTIONS]**

* * *

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* * *

[page 1]

Pursuant to Fed. R. Civ. P. 60(a)-(b) and LCivR 7.4, Mary Scott, through her attorneys Frank, Haron, Weiner and Navarro, for her Motion for Reconsideration and/or Relief, and states as follows:

## DISCUSSION

The Court has made a grave and palpable error, which has inflicted a grave injustice on Plaintiff, in the Court's conclusions relative to the Opinion and Order of sanctions entered by the Court on September 29, 2005. For the reasons set forth in this brief, the Court should vacate the Opinion (Dkt. 605) and Order (Dkt. 606) in their entirety. Further, the Court should hold an evidentiary hearing relevant to the circumstances underlying Defendants' false submissions to the Court, which

were the predicate for the Court's erroneous conclusions.

* * *

[page 3]

ANALYSIS

I. The fragmentary tape of the meeting that Defendants submitted to the Court as the tape that was produced for them in discovery (Dkt. 512, Exh. A, marked as MS-Rule 26-00680) is a fake.

The Court correctly concluded that the fragmentary tape (actually in CD form) submitted by Defendants as Dkt. 512, Exh. A, marked as MS Rule 26-00680, which Defendants represented to the Court to be what they received from Plaintiff as her Rule 26 disclosure of 2/7/02 tapes, does not contain the discussion of the physician compensation model, which, in the Court's opinion, "doomed" Plaintiff's case.

At (sic) this brief demonstrates, Dkt. 512, Exh. A is not the Rule 26 production that Plaintiff made to Defendants. **It is a fake that only Defendants could have created.**

* * *

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## CONCLUSION

Based on the foregoing, the Court has committed a grave error regarding the predicate facts underlying the Court's Opinion and Order on sanctions. The impetus for the Court's conclusions – the false submissions and unsupported arguments made by Defendants – are demonstrably false and the Court should vacate the Opinion and Order in question in its entirety. Further, the Court should hold an evidentiary hearing relevant to the circumstances underlying Defendants' false submissions to the Court, which were the predicate for the Court's erroneous conclusions.

* * *

[page 21]

Respectfully submitted,
FRANK, HARON, WEINER
AND NAVARRO
/s/

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Dated: October 10, 2005

## APPENDIX 7

## LOCAL RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
## III. PLEADINGS AND MOTIONS

### Rule 7. Motion Practice

* * *

**7.2 Dispositive Motions.**

(b) *Length of Briefs.* Any brief filed in support of or in opposition to a dispositive motion shall not exceed twenty-five (25) pages in length, exclusive of cover sheet, tables, and indices.

* * *

(d) *Oral Argument.* Any party desiring oral argument shall include a request for oral argument in the caption and the heading of the party's brief. In its discretion, the Court may schedule oral argument or may dispose of the motion without argument at the end of the briefing schedule. The time for oral argument on all motions shall be scheduled and noticed by the Court at the earliest convenient date.

* * *

**7.3 Nondispositive Motions.**

(b) *Length of Briefs.* Any brief filed in support of or in opposition to a nondispositive motion shall not exceed ten (10) pages in length, exclusive of cover sheet, tables, and indices.

* * *

(d) *Oral Argument.* Any party desiring oral argument shall include a request for oral argument in the caption and the heading of the party's brief. In its discretion, the Court may schedule oral argument or may dispose of the motion without argument at the end of the briefing schedule. The time for oral argument on all motions shall be scheduled and noticed by the Court at the earliest convenient date.

## APPENDIX 8

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**No. 1:02-cv-485**

**[Filed July 25, 2005]**

| | |
|---|---|
| UNITED STATES OF AMERICA, ex rel. MARY SCOTT, Plaintiff, | ) |
| v. | ) |
| METROPOLITAN HEALTH CORP. d/b/a METROPOLITAN HOSPITAL, a Michigan corporation, and MICHAEL FAAS, an individual, Jointly and severally, Defendants. | ) |

**BEFORE:** Honorable Richard Alan Enslen, Federal Judge

Defendants Metropolitan Health Corporation and Michael Faas have moved for leave to file excess pages regarding their Bill of Costs and Motion for Attorneys' Fees, Expenses and Non-Taxable Costs as Sanction. The proposed brief is some 19 pages plus many attachments and includes a request for a large amount of taxable costs and an even larger amount of attorney fees and non-taxable costs as a sanction for misconduct. The excess pages are clearly necessary given the subject of the dispute. As such, the Court will permit the lengthy briefing as well as a similar response from Plaintiff Mary Scott.

**THEREFORE, IT IS HEREBY ORDERED** that Defendants Metropolitan Health Corporation and Michael Faas' Motion to Exceed Page Limitation for Brief in Support of Defendants' Bill of Costs and Motion for Attorneys' Fees, Expenses, and Non-Taxed Costs as Sanctions (Dkt. No. 574) is **GRANTED** and the Clerk shall accept the proposed brief for filing.

**IT IS FURTHER ORDERED** that Plaintiff Mary Scott is **GRANTED LEAVE** without further Order of this Court to file a lengthy response brief, which shall not to exceed twenty-five pages.

/s/
RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

DATED in
Kalamazoo, MI
July 25, 2005

## APPENDIX 9

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**No. 1:02-cv-485**

**[Filed January 30, 2004]**

| | |
|---|---|
| UNITED STATES OF AMERICA, ex rel. MARY SCOTT, Plaintiff, | ) |
| v. | ) |
| METROPOLITAN HEALTH CORP. d/b/a METROPOLITAN HOSPITAL, et al., Defendants. | ) |

**BEFORE:** Honorable Richard Alan Enslen, Federal Judge

The Court, having considered the Stipulation of Dismissal in Part filed by the United States and Relator Mary Scott, it is hereby

**ORDERED**

1. The Parties have executed a Settlement Agreement in this matter, which Relator agrees is fair, adequate, and reasonable pursuant to 31 U.S.C. § 3730(c)(2)(B) and (b)(1).

2. The First-Amended Complaint against defendants Metropolitan Health Corporation d.b.a Metropolitan Hospital, Metropolitan Enterprises, Inc., West Michigan Management Services, Inc., Michael Faas, William Cunningham, D.O., John Edleman, D.O., Philip Gaca, D.O., Gary Marsiglia, D.O., Steven Dupuis, D.O., Guy Garrett, D.O., Bradley Clegg, D.O., James Lang, D.O., Paul Gauthier, D.O., Christine Lawrence, R.N., J.D., Joseph Sage, D.O., Donald Bouchard, D.E., John S. Budnick, D.O., Michael McCulley, D.E., Frank Belsito, D.O., Ann Breitweiser, D.O., and Karl Breitweiser, D.O. shall be dismissed in part based on the terms of the Settlement Agreement, as follows:

(a) The First-Amended Complaint is dismissed in its entirety with prejudice to the Relator, with the exception of claims regarding attorney's fees arising out of the dismissed claims and the relator's employment or termination thereof (which also include a claim for attorney fees), as set forth in Paragraphs 1 and 6 of the Settlement Agreement;

(b) The allegations in the First-Amended Complaint described as the Covered

Conduct as defined in the Settlement Agreement are dismissed with prejudice to the United States; and

(c) The allegations in the First-Amended Complaint that are not the Covered Conduct as defined in the Settlement Agreement are dismissed without prejudice to the United States.

3. The Court shall retain jurisdiction to enforce the terms of the Settlement Agreement and shall permit the United States and Relators to re-open and proceed with this action should Metropolitan fail to make full payment of the Settlement Amount within the time period described in paragraph 1 of the Settlement Agreement. The Court also shall retain jurisdiction over the Relator's claims regarding attorney's fees arising out of the dismissed claims and the relator's employment or termination thereof (which also includes a claim for attorney fees).

**SO ORDERED.**

/s/ Richard Alan Enslen
HON. RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE

Dated: January 30, 2004